Supreme Court, U.S.
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No. 05-755

IN THE SUPREME COURT OF THE UNITED STATES

JILL BROWN, Warden, *Petitioner,*

v.

SANTOS L. REYES, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Lockyer v. Andrade*, 538 U.S. 63, 72-73, 75-76 (2003), this Court held that a gross disproportionality principle under the Eighth Amendment applies to a sentence for a term of years, but that the principle reserves a constitutional violation for only the exceedingly rare and extreme case. This Court further held that it has not established a clear path for courts to follow in determining whether a particular sentence for a term of years violates the Eighth Amendment.

Under 28 U.S.C. § 2254(d)(2), a federal habeas court may not issue a writ unless the relevant state-court adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. In *Williams v. Taylor*, 529 U.S. 420, 430, 432, 435 (2000), this Court held that 28 U.S.C. § 2254(e)(2) precludes a federal habeas court from holding an evidentiary hearing on a claim if the petitioner failed to develop the factual basis of the claim in State court proceedings.

In this case, Reyes had two prior strikes, including one for armed robbery. The trial court denied Reyes's motion to dismiss his strikes. The motion did not raise any issues concerning the circumstances of Reyes's prior convictions; it was limited to a claim that the triggering offense was so trivial that a 25-years-to-life sentence would be disproportionate. The court sentenced Reyes under California's Three Strikes law to prison for a term of 25 years to life. Reyes appealed the judgment and ultimately filed a petition for review in the California Supreme Court raising an Eighth Amendment claim. His appeal did not raise any issues concerning the circumstances of the prior convictions; instead, it reiterated the claim that the sentence was disproportionate in light of the minor nature of the triggering offense. The state court of appeal and the California Supreme Court rejected the claim. Reyes filed a petition for writ of habeas corpus in federal court raising an Eighth

Amendment claim. The District Court denied the petition. The Ninth Circuit issued a published opinion remanding the case to the district court for further development of the record as to the circumstances underlying the armed robbery conviction.

1. In light of *Lockyer v. Andrade*, 538 U.S. 63 (2003), can federal habeas corpus relief on cruel-and-unusual-punishment grounds be granted on a sentence that properly comports with California's Three Strikes law?

2. Does it violate the limitations of 28 U.S.C. § 2254(e)(2) to permit a habeas litigant to develop facts underlying his prior convictions as part of an Eighth Amendment challenge, when he never attempted to develop those facts as part of such a challenge in the State court?

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California Supreme Court
Petition for Review

IN THE SUPREME COURT OF THE UNITED STATES

No.

JILL BROWN, Warden, *Petitioner,*

v.

SANTOS L. REYES, *Respondent.*

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on March 4, 2005. The opinion is reported at 399 F.3d 964 (9th Cir. 2005).A copy of the slip opinion is attached to this petition, as Appendix A. On October 12, 2005, a divided panel denied Petitioner's petition for rehearing en banc. No judge of the court requested an en banc rehearing. The judgment and order of the district court, and the magistrate judge's report and recommendation, are unreported; a copy of each is attached to this Petition as Appendices F, G, and H. The California Court of Appeal's unpublished opinion is attached to this Petition as Appendix J. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTION, STATUTES, OR REGULATIONS

United States Constitution, VIII Amendment.

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (AEDPA)28 U.S.C. § 2254 et seq.

STATEMENT OF THE CASE

In September 1997, under penalty of perjury, Reyes signed an application for a driver's license using another person's name. Appendix J at 59. Reyes's criminal record consisted of: (1) a 1981 juvenile adjudication for burglary, resulting in a commitment to the California Youth Authority for 2 years; (2) a 1984 misdemeanor conviction for being under the influence of drugs, resulting in probation with 90 days jail time; (3) a 1986 armed robbery conviction, resulting in a prison sentence of 9 years; (4) a 1994 conviction for petty-theft with a prior theft-related conviction, resulting in a prison sentence of 16 months; (5) a 1995 driving-under-the-influence conviction, resulting in probation; and (6) a 1997 conviction for battery, resulting in 30 days jail time. Appendix C at 20-21; Appendix J at 68-69.

The San Bernardino County District Attorney charged Reyes with one count of perjury (Penal Code § 118), alleged two prior strikes, i.e., the 1981 juvenile adjudication and the 1987 armed-robbery conviction, and alleged the 1994 conviction as a prison-prior. A jury convicted Reyes on the substantive count and found the allegations true. Appendix J at 58-60.

Prior to trial, Reyes filed a "Romero"[1/] motion asking the court to dismiss the priors. Appendix D. At sentencing, the

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1. In *People v. Superior Court (Romero)*, 13 Cal. 4th 497, 529-30, 53 Cal. Rptr. 2d 789 (1996), the California Supreme Court held sentencing courts have the power, pursuant to California Penal Code § 1385, to dismiss strikes in the interests of justice.

court deemed a portion of defense counsel's argument as a renewed "Romero" motion. Appendix I at 48-50, 55. After reviewing Reyes's criminal history, the court denied the motion. Appendix I at 55-56. The court said Reyes was a thief, a liar, and a drug and alcohol abuser. Appendix I at 55. The court said it was convinced that the world was not safe with Reyes on the street, that he needed to be kept off the streets for as long as possible, and that Reyes was exactly the sort of person the California Legislature had in mind when it enacted the Three Strikes law. Appendix I at 55-56. The court sentenced Reyes to 25 years to life on the substantive count, and added a year for the prison prior. Appendix I at 56.

In an unpublished opinion filed June 9, 1999, the California Court of Appeal rejected Reyes's claim that his sentence violated the Eighth Amendments's proscription against cruel and unusual punishment. Citing *Harmelin v. Michigan*, 501 U.S. 957 (1991), the court said the Eighth Amendment prohibits sentences grossly disproportionate to the crime. Citing *Rummel v. Estelle*, 445 U.S. 263 (1980), the court said state statutes imposing enhanced sentences for recidivist behavior have long been upheld. Thus, the court held, in light of Reyes's past and present offenses, he had not shown his punishment was grossly disproportionate to his recidivist behavior. Appendix J at 71.

Reyes filed a petition for review in the California Supreme Court, claiming, inter alia, his sentence was cruel and unusual punishment in light of the minor nature of the triggering offense. Appendix K. On September 1, 1999, the California Supreme Court denied the petition, with three Justices voting to grant. Appendix B.

On July 26, 2000, Reyes filed a petition for writ of habeas corpus in the United States District Court, claiming, inter alia, that in light of the minor nature of the triggering offenses, his sentence constituted cruel and unusual punishment. Appendix H at 39. On September 21, 2000, the magistrate judge filed a Report and Recommendation (R & R), recommending the claim

be denied. Appendix H at 40. Referencing Reyes's criminal history, the R & R said a comparison of his crime and sentence did not lead to an inference of gross disproportionality. Citing *Rummel v. Estelle*, the court held that, even where a triggering offense is relatively minor, a life sentence based on a recidivist sentencing scheme does not constitute cruel and unusual punishment. Appendix H at 41-42. On October 12, 2000, the District Court adopted the R & R, denied the petition, and dismissed it with prejudice. Appendix F at 36; Appendix G at 37-38.

The District Court denied Reyes's request for a certificate of appealability. Appendix E. Reyes petitioned the Ninth Circuit for a certificate of appealability. On May 2, 2001, the Ninth Circuit granted a certificate of appealability as to the Eighth Amendment issue. Appendix A at 6.

The case was argued and submitted on March 7, 2002. Appendix A at 1. On April 3, 2002, the Ninth Circuit ordered the submission withdrawn pending this Court's decisions in *Andrade* and *Ewing*, which were then pending in this Court. Appendix A at 1. *Lockyer v. Andrade*, 538 U.S. 63, and *Ewing v. California*, 538 U.S. 11 (2003), were decided March 5, 2003. On April 17, 2003, the Ninth Circuit ordered the matter resubmitted. Appendix A at 1. On December 29, 2003, the Ninth Circuit filed a 2-1 memorandum disposition affirming the District Court. On March 4, 2005, the Ninth Circuit granted Reyes's petition for rehearing, ordered the memorandum disposition and dissent withdrawn, and replaced the withdrawn disposition with a 2-1 published opinion reversing the District Court. Appendix A at 1.

Petitioner filed a petition for rehearing. In an Order filed October 12, 2005, a divided panel denied a panel rehearing and noted no judge of the court had requested an en banc rehearing.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the Ninth Circuit has decided important federal questions concerning issues of

overarching importance to the criminal justice system in California in a way that conflicts with the relevant decisions of this Court and with the AEDPA. This Court's intervention is warranted because the Ninth Circuit's recent decisions confirm that the court continues to misunderstand the scope of federal habeas corpus review, and therefore needs additional guidance. *Kane v. Garcia Espitia*, __ U.S. __, 126 S. Ct. 407 (2005); *Schriro v. Smith*, __ U.S. __, 126 S. Ct. 7 (2005); *Mayle v. Felix*, __ U.S. __, 125 S. Ct. 2562 (2005); *Brown v. Payton*, __ U.S. __, 125 S. Ct. 1432 (2005); *Lockyer v. Andrade*, 538 U.S. 63.

A. The Ninth Circuit's Opinion Establishes A Precedent For Eighth Amendment Claims That Conflicts With Relevant Supreme Court Precedent

28 U.S.C. § 2254(d)(1) provides that an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by this Court. A state court decision can be contrary to this Court's "clearly established" precedent in two ways: (1) if the state court applies a rule that contradicts the governing law set forth in this Court's jurisprudence; or (2) if the state court confronts facts materially indistinguishable from a relevant precedent of this Court and arrives at a result opposite to the one this Court reached. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). A state court decision can also involve an unreasonable application of this Court's precedent in two ways: (1) if the state court identifies the correct governing legal rule from this Court's jurisprudence but unreasonably applies it to the facts of a particular case; or (2) if the state court either unreasonably extends a legal principle from this Court's jurisprudence to a

new context where it should not apply, or unreasonably refuses to extend the principle to a new context where it should apply. *Williams v. Taylor*, 529 U.S. at 407.

In *Lockyer v. Andrade*, 538 U.S. 63, this Court held that the California Court of Appeal's affirmation of Andrade's two consecutive terms of 25 years to life in prison was neither contrary to, nor an unreasonable application of, this Court's clearly established Eighth Amendment jurisprudence. *Id.* at 73-74, 77. In support of that holding, this Court explained that a gross disproportionality principle under the Eighth Amendment applies to a sentence for a term of years, that the principle reserves a constitutional violation for only the exceedingly rare and extreme case, and that this Court has not established a clear path for courts to follow in determining whether a particular sentence for a term of years violates the Eighth Amendment. *Id.* at 72-73.

In the instant matter, relying on this Court's decision in *Solem v. Helm*, 463 U.S. 277 (1983) and on its own decision in *Ramirez v. Castro*, 365 F.3d 755 (9th Cir. 2004), which in turn relied on *Ewing v. California*, 538 U.S. 11, the Ninth Circuit has essentially held that when a federal habeas court considers an Eighth Amendment claim concerning a sentence imposed under California's three Strikes law, the circumstances underlying the commission of the prior strikes can result in an inference of gross disproportionality. The Ninth Circuit's holding in this regard seriously misapprehends this Court's jurisprudence regarding habeas corpus review of Eighth Amendment claims and conflicts with this Court's precedent as set forth in *Lockyer v. Andrade*, 538 U.S. 63.

In considering Reyes' appeal, the panel majority first addressed the proportionality aspect of Reyes' sentence. Appendix A at 8-9. The majority noted that in *Ramirez*, the court recognized that Eighth Amendment challenges to sentences under California's Three Strikes law remain viable in certain "exceedingly rare" cases. Appendix A at 7 (citing *Ramirez*, 365 F.3d at 756, 770). The majority then explained

that in *Ramirez*, the court applied the Supreme Court's analysis in *Solem v. Helm* to determine, as an initial matter, whether Ramirez's sentence was justified by the gravity of his most recent offense and his criminal history -- a determination that addresses whether there is an inference of gross disproportionality. Appendix A at 7-8. The majority further explained that in *Ramirez*, the court found the sentence did not match the gravity of the triggering offense because Ramirez's conduct did not threaten grave harm to society. Appendix A at 8. The majority found the reasoning in *Ramirez* applicable in the instant case because Reyes' conduct did not constitute a crime targeted at another individual. Appendix A at 8.

The majority then compared Reyes' criminal history to Ramirez's. The majority explicitly acknowledged that the court in *Ramirez* looked past the definitions of the prior offenses, to the factual specifics of the crimes, in order to decide whether the sentence was justified by the prior offenses. Appendix A at 11-12. In *Ramirez*, the court minimized the gravity of Ramirez's prior crimes, focusing on what the court characterized as the absence of force in Ramirez's prior robbery-by-force offenses, i.e., one involved running over a security guard's foot and the other involved Ramirez pushing a security guard as he was leaving a store. *Ramirez v. Castro*, 365 F.3d at 768-769. The majority began to conduct the same analysis in *Reyes*. The majority was unable to complete its proportionality analysis, however, because it felt the record did not provide enough information about Reyes' armed-robbery conviction. Appendix A at 9-13. The majority felt the nature of the armed robbery might be significant because it could distinguish the matter from *Ramirez*. Appendix a at 9-10. The majority vacated the district court's denial of Reyes' petition for a writ of habeas corpus and remanded the case to the district court for further development of the record, to determine whether Reyes is entitled to relief under *Ramirez*. Appendix A at 12-13.

As is plainly evident, the decision in *Reyes* is a result-oriented decision driven by the notion that a federal habeas court's role is to determine whether a sentence properly imposed under California's Three Strikes law is justified by the gravity of the offense, considering both the nature of the triggering offense as well as the criminal history. *See Reyes v. Brown*, 399 F.3d 964, 971 (9th Cir. 2005) (Tallman, J., dissenting) (individual judges chafe at the Supreme Court's decisions in *Ewing v. California* and *Lockyer v. Andrade*). That notion, however, constitutes a fundamental misconception of this Court's decision in *Lockyer v. Andrade*.

The implicit holding in *Lockyer v. Andrade* is that a federal habeas court cannot find a state court ruling upholding an Eighth Amendment challenge to a sentence properly imposed under California's Three Strikes law contrary to, or an unreasonable application of, this Court's clearly-established precedent. This is so for a simple reason. In *Lockyer v. Andrade*, the prior strikes were the least egregious of the serious or violent felonies enumerated in the law (Cal. Penal Code §§ 667.5(c) and 1192.7(c)), and the triggering offense was one of the least serious felonies under California's Penal Code. Nevertheless, despite the fact that the matter included an additional aggravating factor of two triggering offenses, resulting in consecutive sentences of 25 years to life, this Court held the state court decision, which relied on *Rummel v. Estelle*, was neither contrary to, nor an unreasonable application of, this Court's controlling precedent.

In other words, if *Lockyer v. Andrade* did not involve an unreasonable application of this Court's precedent, no state-court analysis of a sentence that comports with California's Three Strikes law could be contrary to, or involve an objectively unreasonable application of, this Court's Eighth Amendment jurisprudence.[2/] This would be true even if the federal court

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2. Of course, Petitioner recognizes that this analysis might not hold true if the California Legislature amended California's Penal Code to

conducted de novo review due to a state court making factual mistakes in its analysis; the federal court would still be bound to analyze the result, and any holding to the contrary would constitute a dismantling of *Lockyer v. Andrade*. Stated another way, if, in the course of considering an Eighth Amendment challenge to a sentence properly imposed under California's Three Strikes law, a federal court were to consider the circumstances of a prior strike, the court would necessarily be reduced to acting in equity, i.e., making an independent determination as to the rightness of the sentence, rather than acting as a habeas court, i.e., determining whether the state court analysis failed to comply with this Court's precedents.

Further, there is no Supreme Court authority allowing a habeas court to look past a state's definition of crimes, to determine whether they involved violence or not, in order to evaluate the seriousness of prior strikes. To the extent the Ninth Circuit found authority to do so in *Solem v. Helm*, 463 U.S. 277, it is incorrect; *Solem* held nothing of the sort. All *Solem* did was look to the state's definition of the elements of the prior offenses. Such an approach is also arguably inconsistent with *Rummel v. Estelle*, 445 U.S. at 271-72, 284-85, where this Court explained that the strength of a state's interest in dealing with criminal recidivists is not necessarily affected by the presence or absence of violence during the commission of offenses.

In addition, to the extent the Ninth Circuit's opinion can be traced to this Court's decision in *Ewing*, via the Ninth Circuit's opinion in *Ramirez*, any reliance on *Ewing* is misplaced. *Ewing* involved a grant of certiorari following direct appeal. Thus, in *Ewing*, this Court considered the pure Eighth Amendment question of whether Ewing's sentence constituted cruel and unusual punishment, and no deference was owed to any state court decision. But here, the matter concerns habeas review.

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create a felony based on conduct so trivial that it would fail a rational-basis test. Nevertheless, even the most minor of California's current felony offenses have not been so construed.

Accordingly, *Andrade*, not *Ewing* controls. Further, *Ewing* was a plurality decision of three Justices, with two others joining only the judgment; one on the grounds that the Eighth Amendment only concerns modes of punishment, and the other on the grounds that the Eighth Amendment does not contain a proportionality principle. Consequently, *Ewing* has little, if any, precedential value regarding federal habeas corpus review of an Eighth Amendment challenge to a sentence under California's Three Strikes law.

Finally, this is a matter of great importance to the criminal justice system in California. As previously discussed, *Lockyer v. Andrade* expressly held that an Eighth Amendment challenge to a recidivist sentence would be viable only in an exceedingly rare case, and implicitly held that a state court analysis of a sentence properly imposed under California's Three Strikes law could not be contrary to, or involve an unreasonable application of, this Court's Eighth Amendment jurisprudence. Nevertheless, in the two years since this Court issued its decision in *Andrade*, the Ninth Circuit has identified three cases that it feels potentially qualify as exceedingly rare, i.e., the instant matter, *Ramirez v. Castro*, 365 F.3d 755, and *Ramirez v. Terhune*, 128 Fed. Appx. 663 (2005).[3/]

Moreover, as the dissent in *Reyes* points out, the *Reyes* decision is inconsistent with the Ninth Circuit's opinion in another case. Appendix A at 14 n.1 (citing *Rios v. Garcia*, 390 F.3d 1082 (2004)). Consequently, as the dissent explains, *Reyes* and *Rios* foretell what is to come, i.e., inconsistent outcomes dependent on how different panels choose to parse facts. *Id.* That approach conflicts with the AEDPA and this Court's precedents, and is an obvious recipe for irreconcilable results and other future problems. Accordingly, in order to allow California to properly enforce its sentencing laws, it is

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3. *Ramirez v. Terhune* is an unpublished case which is the subject of a petition for writ of certiorari that is being submitted as a companion to the instant petition.

necessary for this Court to make explicit what has previously been implicit. This is particularly true due to the fact that defendants sentenced under California's Three Strikes law continue to routinely file petitions for writ of habeas corpus in the federal courts, challenging their sentences on Eighth Amendment grounds.

After all is considered, it appears the Ninth Circuit failed to be guided by the criteria presented in this Court's most recent opinion concerning habeas review of Eighth Amendment challenges in California. Thus, the Ninth Circuit has decided an important question of federal law in a way that conflicts with relevant decisions of this Court. Further, if left unchecked, the decision in the instant matter will result in unprincipled federal review of numerous sentences in California. If the State's independent power to articulate societal norms through its criminal law is to be respected, a great deal more consideration must be shown than is apparent in the Ninth Circuit's decision. Therefore, a writ of certiorari should issue.

B. The Ninth Circuit Failed To Adhere To The Limits Congress Imposed, Through The AEDPA, On Federal Habeas Corpus Review And Rendered A Decision That Both Violates 28 U.S.C. § 2254 And Conflicts With This Court's Relevant Precedent

28 U.S.C. § 2254(d)(2) provides in relevant part that a federal habeas court shall not grant a writ on a claim adjudicated in State court unless the adjudication was based on an unreasonable determination of the facts in light of the evidence presented in State court. 28 U.S.C. § 2254(e)(2) provides that if a habeas applicant has failed to develop the factual basis of his claim in State court, the habeas court shall not hold an evidentiary hearing on the claim unless the applicant shows that his claim relies on a new rule of constitutional law or a factual predicate that could not have been previously discovered by exercising due diligence, and shows that the facts underlying his

claim constitute clear and convincing evidence that but for a constitutional error no reasonable fact-finder would have found him guilty of the underlying offense.

This Court has held that the question of whether a State court's decision was unreasonable must be assessed in light of the record the State court had before it. *Holland v. Jackson*, 124 S. Ct. 2736, 2737-38 (2004). This Court has also held that 28 U.S.C. § 2254(e)(2) precludes a federal habeas court from holding an evidentiary hearing on a claim if the petitioner failed to develop the factual basis of the claim in State court proceedings. *Williams v. Taylor*, 529 U.S. 420, 430, 432, 435 (2000). This Court has further held that a federal habeas court errs if it relies on evidence not properly presented to a state court without first determining whether the habeas petitioner was at fault for failing to develop the factual bases for his claim in state court or whether the petitioner satisfied the exceptions set forth in 28 U.S.C. § 2254(e)(2). *Bradshaw v. Richey*, 546 U.S. ___, 2005 WL 3144332 (2005).

In the instant matter, the Ninth Circuit has remanded the case and ordered the district court to develop the factual record as to the circumstances underlying a prior strike. The record fails to show, however, that Reyes ever sought to develop those facts in any state court proceeding. Instead, in State court Reyes limited his Eighth Amendment claim to a consideration of the seriousness of the triggering offense, thereby leaving any claim based on the circumstances of his priors essentially unexhausted. In fact, an Eighth-Amendment-violation claim based on a theory that the combination of the seriousness of the triggering offense and the seriousness of the prior strikes renders Reyes's sentence disproportionate is a notion sprung sua sponte from the Ninth Circuit. Moreover, in order to comply with the Ninth Circuit's order, the district court will have to hold an evidentiary hearing. Thus, the Ninth Circuit's disposition basically orders a hearing without a determination having been made regarding whether Reyes is at fault for failing to develop the relevant facts in the first place, or if he can satisfy

one of section 2254(e)(2)'s exceptions. Accordingly, the *Reyes* decision conflicts with the express provisions of sections 2254(d)(2) and (e)(2), as well as this Court's relevant precedent.

Further complicating this matter is the fact that the probation report that the trial court considered when it sentenced Reyes states Reyes used a weapon when he committed the armed robbery. Appendix C at 20. Under 28 U.S.C. § 2254(e)(1), that statement, and the trial court's implicit reliance on it, constitutes a fact entitled to deference unless Reyes presented clear and convincing evidence rebutting the presumption.

Finally, this is an important question of federal law, greatly impacting the criminal justice system in California. The practical implications of leaving *Reyes* intact is that it will result in a number of petitions claiming a right to an evidentiary hearing on the facts underlying prior convictions. As a consequence, many petitioners collaterally attacking state court judgments may receive evidentiary hearings to which they are not legally entitled. Further, dissatisfied petitioners would retain the right to appeal the district courts' denials of their claims following evidentiary hearings. In light of its demonstrated willingness to find exceptionally rare cases of cruel and unusual punishment, the Ninth Circuit may well use

those appeals to dismantle the law this Court believed it set forth when it decided *Lockyer v. Andrade*. Therefore, a writ of certiorari should issue.

Dated: December 6, 2005

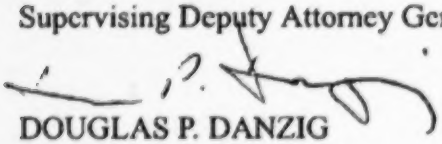
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APPENDIX A

APPENDIX A

[Filed March 4, 2005]
FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SANTOS L. REYES,
Petitioner-Appellant,
v.

JILL BROWN,* Warden
Respondent-Appellee.

No. 01-57130

D.C. No.
CV-00-00608-VAP

OPINION

Appeal from the United States District Court
for the Central District of California
Virginia A. Phillips, District Judge Presiding

Argued and Submitted
March 7, 2002 - Pasadena, California
Submission Withdrawn April 2, 2002
Resubmitted April 17, 2003

Filed March 4, 2005**

Before: Harry Pregerson, Raymond C. Fisher and
Richard C. Tallman, Circuit Judges

Opinion by Judge Pregerson;
Dissent by Judge Tallman

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* Jill Brown is substituted for J.S. Woodford, her predecessor as Warden of San Quentin State Prison. *See* Fed. R.App. P. 43(c)(2).

**This case was originally the subject of a memorandum disposition filed December 29, 2003. *See Reyes v. Woodford*, 83 Fed. Appx. 985 (9th Cir.2003). On January 12, 2004, Reyes filed a petition for panel rehearing and rehearing en banc. In an order filed contemporaneously with this opinion, we grant the petition for panel rehearing; withdraw the December 29, 2003, memorandum disposition; and deny the petition for rehearing en banc as moot.

SUMMARY

Criminal Law and Procedure/Sentencing

The court of appeals vacated a judgment of the district court. The court held that a 26-year "Three Strikes" sentence for being convicted of perjury for making misrepresentations on a driver's license application might present the "exceedingly rare" case in which an Eighth Amendment challenge could be viable.

After unsuccessfully pursuing state relief, appellant California state prisoner Santos Reyes brought a 28 U.S.C. § 2254 habeas action in federal district court challenging his sentence of 26 years to life under California's Three Strikes law. Reyes' third strike was a perjury conviction for making misrepresentations on a California Department of Motor Vehicles (DMV) driver's license application. Reyes contended that his punishment violated the Eighth Amendment's prohibition on cruel and unusual punishment. Reyes' first strike was a conviction for a residential burglary he committed when he was 17 years old; he was sentenced to two years at the California Youth Authority and was paroled after one year. Reyes' second strike was a 1987 conviction for armed robbery for which he was sentenced to nine years, five of which he served; the record did not reveal the circumstances under which this felony was committed. The district court denied Reyes' habeas petition.

Reyes appealed.

[1] Applying the Antiterrorism and Effective Death Penalty Act in *Ramirez v. Castro*, 365 F.3d 755 (9th Cir. 2004), the Ninth Circuit recognized that Eighth Amendment challenges to Three Strikes sentences remain viable in certain "exceedingly rare" cases. [2] In *Ramirez*, the Ninth Circuit concluded that Ramirez' sentence did not match the gravity of the triggering

offense, given that his most recent offense consisted of the nonviolent shoplifting of a VCR. The Ninth Circuit's reasoning that Ramirez' conduct did not threaten grave harm to society applied here, where Reyes' act of falsifying a driver's license application was not a crime targeted at another individual.

[3] As to Reyes' first strike, Reyes' age and the fact that the offense appeared to be nonviolent weighed against finding this to have been a grave offense sufficient to justify his 26 years to life sentence. [4] The sticking point came from Reyes' 1987 conviction for armed robbery. [5] Unfortunately, the circumstances under which Reyes committed the robbery were not sufficiently developed in the record for a determination of whether the offense was a crime against a person or involved violence. Moreover, given that Reyes' first strike was earned as a juvenile, the gravity of his offenses in total rested heavily on his 1987 armed robbery conviction. More facts would help determine the true weight of the offense. Accordingly, the district court's denial of Reyes' habeas petition had to be vacated and the case had to be remanded for the district court to develop the record further and to determine in the first instance whether Reyes was entitled to relief under *Ramirez*.

Judge Tallman dissented, writing that Reyes did not present an "extraordinary" rare case; he was a career criminal for whom there was no need for an evidentiary hearing.

COUNSEL

Gretchen Fusilier, Carlsbad, California, for the petitioner-appellant.
David Delgado-Rucci, Deputy Attorney General, San Diego, California, for the respondent-appellee.

OPINION

PREGERSON, Circuit Judge:

California state prisoner Santos L. Reyes brought this 28 U.S.C. § 2254 habeas action challenging his sentence under California's "Three Strikes" law. Reyes was convicted of perjury for making misrepresentations on a California Department of Motor Vehicles ("DMV") driver's license application. The perjury conviction was Reyes' third strike. He was sentenced to twenty-six years to life. Reyes contends that his punishment violates the Eighth Amendment's prohibition on cruel and unusual punishment. The district court denied Reyes' habeas petition. Because we conclude that the facts necessary to evaluate Reyes' petition were not sufficiently developed before the district court--and, therefore, are not sufficiently developed in the record before us--we vacate the district court's denial of Reyes' petition and remand to the district court for further proceedings.

I.

On September 18, 1997, Reyes entered the DMV on Waterman Avenue in San Bernardino, California. He purportedly filled out an application for a driver's license under the name of his cousin, Miguel Soto, who purportedly knew how to drive but not how to read. Reyes signed the application, which purportedly stated that the information was being provided under penalty of perjury.[1] After Reyes signed the

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1. The parties dispute whether the application Reyes signed was in English or Spanish and whether it stated that the information being provided was under penalty of perjury. For example, the State maintains that Reyes "filled out an English language application .... which stated the information was being provided under penalty of perjury." *See* Appellee's Br. at 4-5,

application, DMV employee Debra Alexander gave Reyes two copies of the written driver's license test. Alexander suspected that Reyes was cheating on the exam by using a "crib sheet." She confiscated the two tests from Reyes and began filling out paperwork related to Reyes' alleged cheating. Meanwhile, Reyes left the DMV building.

Alexander contacted California Highway Patrol Officer Jose Lopez, who was stationed at the DMV. Officer Lopez followed Reyes, who was walking away. After catching up with Reyes, Officer Lopez patted-down Reyes and handcuffed him. Reyes cooperated with Officer Lopez and voluntarily admitted that he had attempted to take the written driver's license test for Soto. The encounter was without violence.

On March 2, 1998, Reyes was arraigned on an Amended Information, charging him with one count of perjury in violation of California Penal Code § 118. Reyes qualified for the Three Strikes enhancement because of two prior convictions: one as a juvenile in 1981 for residential burglary in violation of California Penal Code § 459; and one in 1987 for armed robbery in violation of California Penal Code § 211.

The State offered Reyes a deal of four years imprisonment in exchange for a guilty plea to the perjury charge, but Reyes rejected the plea deal and exercised his constitutional right to a jury trial. On March 5, 1998, a jury convicted Reyes of the

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available at 2001 WL 34355184. In contrast, Reyes maintains that the application "was in Spanish," that he "did not know that he was signing under penalty of perjury," that he "did not know what 'perjury' meant," and that "nothing on" the Spanish application says "'I have read and understood the above.'" *See* Appellant's Opening Br. at 5-6, 8, *available at* 2001 WL 34355185. We need not resolve this dispute because it is not germane to our resolution of the instant appeal.

perjury charge and found the Three Strikes special allegations true. On April 2, 1998, the trial court sentenced Reyes to an indeterminate term of twenty-six years to life.

Reyes appealed the judgment, claiming, among other things, that his sentence violated the Eighth Amendment's prohibition on cruel and unusual punishment. On June 9, 1999, the California Court of Appeal affirmed Reyes' conviction and sentence. On September 1, 1999, the California Supreme Court denied Reyes' petition for review.

On July 26, 2000, Reyes filed a 28 U.S.C. § 2254 habeas petition in the United States District Court for the Central District of California. On September 21, 2000, Magistrate Judge Charles F. Eick issued a report and recommendation urging that Reyes' petition be dismissed with prejudice. On October 12, 2000, District Judge Virginia Phillips adopted the report and recommendation and dismissed Reyes' petition.

On October 31, 2000, Reyes timely filed a notice of appeal and a request for certificate of appealability. On May 2, 2001, we granted Reyes a certificate of appealability on the limited issue whether his Three Strikes sentence violated the Eighth Amendment.[2]

II.

We review *de novo* a district court's decision to grant or deny a 28 U.S.C. § 2254 habeas petition. *See Rios v. Garcia*, 390 F.3d 1082, 1084 (9th Cir.2004). The provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub L. No. 104-132, 110 Stat. 1214, govern Reyes' habeas petition. Under AEDPA, habeas relief is proper

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2. Reyes subsequently filed two requests to broaden the certificate of appealability. We deny those requests in a separate unpublished order filed contemporaneously with this opinion.

if the state court's adjudication of the merits of the habeas claim resulted in a decision that was "'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Rios*, 390 F.3d at 1084 (quoting 28 U.S.C. § 2254(d)). "A state court's decision is 'contrary to' clearly established federal law if it 'applies a rule that contradicts the governing law set forth in [Supreme Court] cases[,]' or (2) 'confronts a set of facts that are materially indistinguishable from a [Supreme Court] decision and nevertheless arrives at a [different] result.'" *Id.* (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). "A state court's decision is an unreasonable application of clearly established federal law if 'the state court identifies the correct governing legal principle from [Supreme Court] decisions but unreasonably applies that principle to the facts of the prisoner's case.'" *Id.* (quoting *Williams*, 529 U.S. at 413, 120 S.Ct. 1495).

III.

[1] Applying AEDPA in *Ramirez v. Castro*, 365 F.3d 755 (9th Cir.2004), we recognized that Eighth Amendment challenges to Three Strikes sentences remain viable in certain "exceedingly rare" cases. *Id.* at 756, 770; *see also id.* at 763 (noting that the Eighth Amendment's "'proportionality principle' ... is applicable 'only in the "exceedingly rare" and "extreme" case'" (quoting *Lockyer v. Andrade*, 538 U.S. 63, 72-73, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003))).[3] We applied the Supreme Court's analysis in *Solem v. Helm*, 463 U.S. 277,

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3. We note that the California Attorney General declined to seek further review of our decision in *Ramirez*, stating that he was acting in "the interest of justice" and calling *Ramirez* an "exceedingly rare case." Henry Weinstein, *Lockyer Gives Up Three-Strikes Case*, L.A. TIMES, Apr. 30, 2004, at B6, *available at* 2004 WL 55909787.

103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), to examine as an initial matter "whether [the petitioner's] extreme sentence is justified by the gravity of his most recent offense and criminal history." *Ramirez,* 365 F.3d at 768 (holding that this inquiry gives rise to an inference of gross disproportionality, which then calls for intrajurisdictional and interjurisdictional analyses).

[2] We concluded that Ramirez' sentence did not match the gravity of the triggering offense, given that his most recent offense consisted of the nonviolent shoplifting of a VCR. *See id.* Our reasoning that Ramirez' conduct did not "threaten[]...grave harm to society" applies here, *id.* (quoting *Harmelin v. Michigan,* 501 U.S. 957, 1003, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (Kennedy, J., concurring)), where Reyes' act of falsifying a driver's license application was not a crime targeted at another individual.[4]

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4. Signing someone else's name on a driver's license application is specifically proscribed by the California legislature as a misdemeanor. *See* Cal. Veh.Code § 20 ("It is unlawful to use a false or fictitious name, or to knowingly conceal any material fact in any document filed with the [DMV]."); *id.* § 40000.5 (classifying a Vehicle Code § 20 violation as a misdemeanor). The offense does not, however, preclude prosecution of the defendant under Penal Code § 118 for felony perjury, instead of the misdemeanor Vehicle Code section that more accurately proscribed Reyes' conduct, *see People v. Molina,* 5 Cal.App.4th 221, 231, 6 Cal.Rptr.2d 736 (1992) (holding that "Vehicle Code section 20 does not preclude perjury prosecutions for those filing false license applications under oath at the DMV"), and in this case, Reyes was convicted after trial of felony perjury. The fact that the California legislature deemed making false statements on a driver's license application to be a misdemeanor reflects that Reyes' offense "is viewed by society as among the less serious offenses." *Solem,* 463 U.S. at 296, 103 S.Ct. 3001 (internal quotations omitted).

We next considered Ramirez' criminal history to determine whether the extreme sentence matched his prior offenses. *See id.* at 768-769. Ramirez had been twice convicted of "second-degree robbery, i.e., willfully and unlawfully taking personal property 'by means of force and fear' in violation of California Penal Code §§ 211, 212.5(c), and 213(a)(2), a 'serious felony' under § 1192.7(c)(19)." *Id.* at 757. The first strike involved shoplifting from a grocery store, after which a get-away car driven by a third person ran over the store security guard's foot. *See id.* at 757, 768. In the second offense, Ramirez pushed a security guard away with his open hand as he ran out of K-Mart with stolen goods. *See id.* at 757, 768. Ramirez was found to have committed these offenses with "force" and was prosecuted for and convicted of "second-degree robbery," as opposed to "petty theft" (Cal.Penal Code §§ 484, 488) or "second-degree commercial robbery" (Cal.Penal Code §§ 459-61) because of the physical contact with the security guards. *Id.* at 768. Ramirez served very little time in prison for these two offenses. *See id.* at 769.

[3] In the instant case, Reyes earned his first strike for residential burglary, in violation of California Penal Code § 459, when he was seventeen years old. He was sentenced to two years at the California Youth Authority and was paroled after one year. Reyes' age and the fact that the offense appeared to be nonviolent[5] — for which he was only required to serve two years at California Youth Authority — weigh against finding this to be a "grave" offense sufficient to justify his twenty-six years to life sentence.

[4] The sticking point in this case comes from Reyes' 1987 conviction for armed robbery in violation of California Penal

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5. The little detail in the record suggests that Reyes was "at some guy's house with some friends and ... walked out with a radio that didn't belong to" him. 3/4/98 Trial Tr. at 120:8-9.

Code § 211. He was sentenced to nine years of which he served five.[6/] The record does not reveal the circumstances under which this felony was committed.[7/] This conviction represents a point

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6. Reyes also has a history of "non-strike" offenses including petty theft; being under the influence of a controlled substance; misdemeanor DUI; and misdemeanor battery. None of these offenses appear to have involved violence, and unlike the criminal histories of the defendant in *Ewing v. California,* 538 U.S. 11, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003), and the petitioner in *Andrade,* 538 U.S. 63, 123 S.Ct. 1166, 155 L.Ed.2d 144, Reyes' criminal history became indisputably less serious over time, *see Ramirez,* 365 F.3d at 765-767 (describing Ewing's and Andrade's criminal histories).

7. The paucity of detail in the record indicates that this offense may have been non-violent. *Compare* 3/4/98 Trial Tr. at 120:17-24 (suggesting that Reyes "was stealing"--"not robbing" but "had a knife" on his person), *with Rios,* 390 F.3d at 1086 (distinguishing *Ramirez* because, during the commission of his triggering offense, "Rios struggled with the loss prevention officer and tried to avoid apprehension" and, during his prior robbery "strikes," Rios' "cohort *used* a knife" (emphasis added)).

The dissent argues that we are being unfaithful to *Ramirez* because *Ramirez* "focuses on the *presence* of a weapon, not whether, how, or where it was or was not *used* "and "Reyes ... himself, carried the weapon." Dissent at 971 n. 1 (emphasis in original). With respect to our able colleague, we believe that he is misreading *Ramirez. Ramirez* never refers to "the presence of a weapon." Rather, each time *Ramirez* refers to weapons, it refers exclusively to whether weapons were "involved." 365 F.3d at 757, 768, 775; *see also Rios,* 390 F.3d at 1086 (noting that Ramirez' "prior convictions were for non-violent robberies in which no weapons were *involved*"

of departure from *Ramirez*, given the nature of the offense and the nine-year prison term to which Reyes was sentenced.

However, in *Ramirez*, even though the defendant was convicted of two "serious felonies," we considered the factual specifics of Ramirez' conduct. *Ramirez*, 365 F.3d at 767 (looking past the definitions of the crimes of which Ramirez was convicted to determine whether Ramirez' conduct involved violence or was particularly serious). Although Ramirez was twice convicted of robbery "by force," we minimized the gravity of the offenses by noting that in the first strike offense a third person had run over the security guard's foot, resulting in a "minor injury." *Id.* And in the second strike offense, Ramirez

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(emphasis added)). We understand *Ramirez'* use of the word "involved" to mean "engaged or employed." Webster's Encyclopedic Unabridged Dictionary of the English Language 1005 (rev. ed.1996) (defining "involve" as "to engage or employ"). Surely, involving, engaging, or employing a weapon constitutes more than the mere presence of an unused weapon.

The dissent also asserts that "*Rios* arguably weighs in favor of finding Reyes' punishment justified" because "in *Rios* ... Rios' *cohort* used a weapon," whereas here "Reyes ... *himself*, carried the weapon." Dissent at 971 n. 1 (emphasis added). We think our colleague misses the point. *If* Reyes (or an accomplice, if any) actually *used* a knife in the commission of his 1987 robbery, "an inference of gross disproportionality" would not be raised because it is the *use* of a weapon that "'threaten[s] to cause grave harm.'" *Ramirez*, 365 F.3d at 765, 768 (quoting *Harmelin*, 501 U.S. at 1002, 111 S.Ct. 2680 (Kennedy, J., concurring)). Would our dissenting colleague hold that a shoplifter caught with a small pocket-knife in his pocket necessarily committed a violent crime? In this case, the record is entirely unclear as to whether the conduct underlying Reyes' 1987 conviction involved anything more.

pushed away the security guard with his hand on his way out the door. *See id.*

In *Solem,* the Supreme Court found an Eighth Amendment violation where the habeas petitioner was sentenced to life without parole for "uttering" a false check under a recidivist statute. 463 U.S. at 279-80, 103 S.Ct. 3001. He had a history of *six* nonviolent felonies, including three separate third-degree burglaries, obtaining money under false pretenses, grand larceny, and driving while intoxicated. *See id.* In considering the gravity of his offenses, the Court noted that "nonviolent crimes are less serious than crimes marked by violence or the threat of violence." *Id.* at 292-93, 103 S.Ct. 3001. The Court concluded that "his prior offenses, although classified as felonies, were all relatively minor. *All were nonviolent and none was a crime against a person.*" *Id.* at 296-97, 103 S.Ct. 3001 (emphasis added).[8/]

[5] In the instant case, but for Reyes' armed robbery conviction, Reyes would appear to have a plausible case for

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8. The dissent labels Reyes a "career criminal" whose "criminal history reflects the very type and degree of recidivism the Supreme Court recognizes Three Strikes laws were properly intended to address." Dissent at 971 (citing *Rummel v. Estelle,* 445 U.S. 263, 284-85, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980)). But Reyes is no more a career criminal than the petitioner in *Solem,* who the Supreme Court held was entitled to habeas relief under the Eighth Amendment. *Compare* Dissent at 971 (noting that, between 1981 and 1997, Reyes committed six crimes) *with Solem,* 463 U.S. at 279-80, 103 S.Ct. 3001 (discussing Solem's six convictions for third-degree burglary, obtaining money under false pretenses, grand larceny, and driving while intoxicated).

relief under *Ramirez*.[9] Unfortunately, the circumstances under which Reyes committed the robbery are not sufficiently developed in the record for us to determine whether the offense was a "crime against a person" or involved violence. Moreover, given that Reyes' first strike was earned as a juvenile, the gravity of his offenses in total rests heavily on his 1987 armed robbery conviction. More facts, such as those on which we relied in *Ramirez*, would help determine the true weight of the offense beyond the label of the crime ("armed robbery") of which Reyes was convicted. Accordingly, we vacate the district court's denial of Reyes' habeas petition and remand for the district court to develop the record further and to determine in the first instance whether Reyes is entitled to relief under *Ramirez*.

The panel shall retain jurisdiction over this matter.

VACATED and REMANDED.

TALLMAN, Circuit Judge, dissenting:

In *Ewing* and *Andrade*, the United States Supreme Court found that California Three Strikes sentences at issue did not violate the Eighth Amendment prohibition on cruel and unusual

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9. Our suspicion that Reyes' twenty-six years to life sentence may be grossly disproportionate to the gravity of his triggering offense and criminal history is also supported by the fact that the State offered Reyes a deal of four years imprisonment in exchange for a guilty plea to the triggering perjury charge. By offering Reyes such a heavily discounted sentence, an inference may properly be raised that the State did not view Reyes as a "danger to society" and that the State did not feel "the need to counter his threat with incapacitation." *Andrade*, 538 U.S. at 81, 123 S.Ct. 1166 (Souter, J., dissenting).

punishment. *Lockyer v. Andrade,* 538 U.S. 63, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003), *Ewing v. California,* 538 U.S. 11, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003). In its opinions, the Court allowed for the remote possibility of finding a statutory punishment unconstitutional when it is "grossly disproportionate." *Andrade,* 538 U.S. at 73, 123 S.Ct. 1166; *see also Ewing,* 538 U.S. at 23, 123 S.Ct. 1179 (noting that the Eighth Amendment contains a narrow "proportionality principle that applies to noncapital sentences") (internal quotations and citations omitted). The Court did not elaborate what types of violations this exception might encompass, but warned that "it is applicable 'only in the exceedingly rare and extreme case.'" *Ramirez v. Castro*, 365 F.3d 755, 763 (9th Cir.2004) (discussing *Andrade,* 538 U.S. at 72-73, 123 S.Ct. 1166). This is not one of them.

After the Court's decisions in *Ewing* and *Andrade,* the Ninth Circuit quickly found such an exceedingly rare case in *Ramirez.* Although *Ramirez* is now the law of the circuit for habeas challenges to Three Strikes sentences, its analysis is less than ideal. The *Ramirez* opinion sets forth what is, at best, a nebulous balancing test for analyzing whether a lengthy Three Strikes sentence violates the proportionality principle: whether the sentence is "justified by the gravity of [the petitioner's] most recent offense and criminal history." *Ramirez,* 365 F.3d at 768; *see also Ewing,* 538 U.S. at 29, 123 S.Ct. 1179 (noting that, when considering the gravity of the offense, the court "must place on the scales not only his current felony," but also his criminal history).

In determining the gravity of the triggering offense and criminal history, *Ramirez* instructs courts to examine the "core conduct" of the crimes and consider: (1) whether the crime involved the use of force; (2) whether weapons were present;[1/]

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1. The panel majority attempts to distinguish *Reyes*

(3) whether the crime was violent in nature; and (4) the length and type of sentence imposed. *See Ramirez,* 365 F.3d at 768-69 (discussing the factors of Ramirez's triggering offense and criminal history that were relevant in determining whether the sentence was justified).[2/]

The court here declares that *Reyes* potentially presents another one of these *exceptionally* rare cases, and that an evidentiary hearing is required in order to determine whether Reyes' punishment violated the proportionality principle. Based on Supreme Court and Ninth Circuit precedent, I disagree with

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from *Rios v. Garcia,* 390 F.3d 1082 (9th Cir.2004), by focusing on the fact that Rios' cohort *used* a weapon. This sort of parsing is unpersuasive in distinguishing the two cases and also illustrates the difficulties of following precedent such as *Ramirez.* First, as unworkable as *Ramirez* is, it focuses on the *presence* of a weapon, not whether, how, or where it was or was not *used.* Second, even *Rios* arguably weighs in favor of finding Reyes' punishment justified; in *Rios,* the court found his punishment justified simply because Rios' cohort had a weapon. Reyes has no such excuse because he, himself, carried the weapon. Finally, *Rios* and the majority opinion here foretell what is to come in the wake of *Ramirez:* inconsistent outcomes in cases depending on whether individual panels choose to focus on the *presence* versus the *use* versus the *involvement* of a weapon. Surely the Eighth Amendment analysis must rely on more substantive distinctions. All three cases err in ignoring the key point that the Three Strikes Statute punishes recidivism, not subtle differences between the nature of the triggering offense or prior offenses.

2. Ramirez did not explicitly list a set of factors to consider when making this inquiry, nor did it explicitly state that this was a balancing test, leaving future panels with the unfortunate task of gleaning clear guidelines from the opinion.

both of these propositions. However much individual judges chafe at the Supreme Court's decisions in *Ewing* and *Andrade* or the electorate's continuing and clear expression of support for tough treatment of repeat offenders, our obligation is to apply the law which the Supreme Court upheld in *Andrade* and *Ewing*.

Reyes does not present an "extraordinary" rare case; he is a career criminal. Between 1981 and 1997, he committed six crimes and spent almost seven years behind bars, five of which were passed in state prison. His criminal history reflects the very type and degree of recidivism the Supreme Court recognizes Three Strikes laws were properly intended to address. *Rummel v. Estelle*, 445 U.S. 263, 284-85, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980) (rejecting an Eighth Amendment challenge to Texas' recidivist statute). Furthermore, even if a narrow class of cases exist that might constitute an unusual exception, Ramirez's criminal history pales in comparison to Reyes' sixteen years of on-again, off-again criminality. I would not characterize the nature of Reyes' prior convictions as charitably as does the majority, particularly where Reyes has been convicted of battery, armed robbery, and driving while under the influence, all of which pose a potential of seriously injuring other people.

There is no need for an evidentiary hearing. While the *Ramirez* balancing test is admittedly vague, at least two of the four factors that the *Ramirez* court considered relevant weigh heavily in favor of finding Reyes' sentence justified. First, Reyes was convicted of *armed* robbery; contrary to the panel majority's inferences, this strike certainly involves at least the *presence* of a weapon during the commission of a violent crime. Second, Reyes served five years of a nine-year state prison sentence for his armed robbery conviction. Not only is this a lengthy sentence, but *Ramirez* explicitly noted that a critical consideration in determining whether a sentence is

proportionate is whether the petitioner has ever "been sentenced to [or] served any time in *state prison* prior to committing" the triggering offense. *Ramirez*, 365 F.3d at 769 (emphasis added). These facts strongly distinguish Reyes' case from *Ramirez* and justify the Three Strikes sentence imposed.

It is unclear what sorts of facts the court here anticipates will be revealed during the evidentiary hearing, or what difference they will make in the proportionality inquiry. It is also unclear what facts the district court on habeas review is permitted to revisit in its "core conduct" inquiry in the face of a final state criminal judgment that Reyes committed a robbery while armed. Because *Ramirez* sets forth a balancing test, the district court must simply determine that, in consideration of the four factors, and particularly his pattern of continuing criminal behavior, Reyes' prior time spent in state prison and his earlier conviction for armed robbery render his Three Strikes sentence for perjury justified under controlling Supreme Court precedent. There is no need for an evidentiary hearing to reach that conclusion on the record already before us.

I would deny Reyes' petition for rehearing and petition for rehearing en banc. Accordingly, I **DISSENT** from this futile remand.

APPENDIX B

APPENDIX B

[Filed September 1, 1999]

Fourth Appellate District, Division Two, No. E02274

SO80656

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Respondent

v.

SANTOS LEONE REYES, Appellant

Appellant's petition for review DENIED.

Mosk, J., Kennard, J., and Brown, J., are of the opinion the petition should be granted.

GEORGE
Chief Justice

APPENDIX C

APPENDIX C

SAN BERNARDINO COUNTY PROBATION DEPARTMENT
PROBATION OFFICER'S REPORT

DEFENDANT'S NAME REYES, SANTOS LEONE ALIAS(S) REYES SANTOS LEONE							COURT CRTC - S.B. DEPT. 12	JUDGE BRIAN S. MCCARVILLE	COURT NUMBER FSB 16003 ACIS		
ADDRESS (PRESENT/RELEASE) PH.(909)881-3283 560 WEST 25TH STREET, SAN BERNARDINO, CA 92405							HEARING DATE 4-2-98	ATTORNEY J. DUCRE	PROB NUMBER 0084456		
BIRTH DATE 3-22-63 * AGE		POB MEXICO		NATIONALITY MEXICAN			CONVICTED BY JURY	CONV DATE 3-5-98	COURT/CONV CRTC - S.B. DEPT. 12		
HT 5'6"	WT 165	EYES BRN	HAIR BLK	ETHNIC HISPANIC	SEX MALE		ARRESTING AGENCY CA HIGHWAY PATROL		BOOKING AGENCY SBSO		
SSN 568-51-9445		BI A06923514		FBI 574442W6			CUSTODY STATUS [ ]BAIL [ ]OR [X]CUSTODY				
DRIVER'S LICENSE NONE		STATE N/A		STATUS N/A			CONVICTED CHARGES COUNT I, PC 118, PERJURY, WITH PRIOR @ 1-3 SPECIAL ALLEGATIONS PURSUANT TO PC 1170.12(a)-(d) AND 667(b)-(i) AND 667.5(b), FOUND TRUE				
SCARS, TATTOOS, OTHER MARKS TATTOOS: "SURENO" - STOMACH; EAGLE & AZTEC INDIAN - CHEST; SMILE NOW CRY LATER - LEFT ARM							PLEA AGREEMENT NONE				
BOOKING NO. 9709301299		ARREST DATE 9-18-97		RELEASE DATE IN CUSTODY		DAYS 195	CO-DEFENDANT(S)/DISPOSITION NONE				
TOTAL CUSTODY DAYS 195											
PERSONAL HISTORY (Not independently verified by Probation Department)											
EDUCATION 11TH GRADE		MILITARY NONE		SPECIAL TRAINING AUTO BODY; SPRINKLER SYSTEM			HEALTH GOOD		DRUGS/ALCOHOL/MEDICATIONS NONE/NONE/NONE		
TREATMENT HISTORY NONE							EMPLOYER (Name, Address, Ph.) FAIRFIELD PROPERTIES, LEMON ST., MIRA LOMA				
TIME ON JOB 3 YEARS		INCOME $500		TYPE OF WORK MAINTENANCE			MARITAL STATUS MARRIED		SPOUSE CONCEPCION PALOMARES		
CHILDREN 2 (3 & 1)		ASSETS, DEBTS, CHILD SUPPORT NONE/NONE/NONE					CONTACT PERSON GLORIA GUERRA, (526)448-7771				
FATHER (Name, Address, Ph.) SANTOS REYES, MEXICO							MOTHER (Name, Address, Ph.) LUISA LEON, MEXICO				
ADDITIONAL INFORMATION *ALSO USES DOB: 3-21-62											
FACE SHEET TAKEN BY LUPE VENEGAS							EXTENSION 387-3244		DATE 3-16-98		

FSB 16003 REYES, SANTOS LEONE APRIL 2, 1998

PRIOR RECORD: According to records of the San Bernardino Sheriff's Office, the Bureau of Identification, the Department of Motor Vehicles, and the Federal Bureau of Investigation, the defendant has the following prior record:

DATE	AGENCY	OFFENSE	DISPOSITION
1-17-81	EL MONTE PD	PC 496, REC. STOLEN PROP, PC 459, BURGLARY	3-19-81; CONV. PC 459, BURGLARY, 2 YRS. CYA. 1-18-82; PAROLED.
12-2-84	EL MONTE PD	H&S 11550(a), UNDER INF.OF CONT. SUB.	4-17-85; M081884 CONV. MISD., 2 YRS. PROB., 90 DAYS COUNTY JAIL.12-3-85; PROB. REVOKED. 2-13-86; PROB. MODIFIED, EXTENDED TO 6-26-87. 8-29-86; PROB. REVOKED.
7-9-86	EL MONTE PD	PC 211, ARMED ROBBERY (2ND STRIKE)	2-26-87; A537700, CONV. FELONY, USED WEAPON WITH PRIOR, 9 YRS. STATE PRISON. 3-28-91; PAROLED.

3-3-94	POMONA PD	PC 484(a) PETTY THEFT	3-21-94; KA021500, CONV. FELONY, PC 666, PETTY THEFT WITH PRIOR, 16 MOS. STATE PRISON.
11-24-95	EL MONTE AGENCY	CVC 23152(b), DUI	11-28-95; #5M10856,3 YRS CT. PROB.
9-18-97	SBSO	PC 115(a), OFFER FALSE/ FORGE INSTRUMENT PC 118, PERJURY PC148 (a), OBSTRUCT PO; PC 242, BATTERY	9-22-97 CONV MWV 027616, MISD. PC 242, 30 DAYS COUNTY JAIL

CIRCUMSTANCES OF THE OFFENSE: On September 18, 1997, a Department of Motor Vehicles (DMV) employee found the defendant, illegally using a crib sheet while taking the California Driver's License written examination. The test was confiscated and Mr. Reyes was asked to come to the lobby. However, he walked out of the DMV and proceeded to the parking lot. At that point he was arrested by a California Highway Patrolman. Mr. Reyes had signed the form with a name of "Miguel Soto" and signed it under penalty of perjury.

While in custody, Mr. Reyes made a spontaneous statement, "I filled out the application to help my cousin Miguel Soto who has taken the license test before and has not passed the test."

DEFENDANT'S STATEMENT: The defendant was interviewed on March 16, 1998, at the West Valley Detention Center. The defendant admitted committing the offense and advised that he went to the DMV to take the test for someone else. His friend, Miguel Soto, wanted a driver's license and had been unable to have one issued because, he could not pass the test. Mr. Soto told him if he would take the test for him, he would let him work with him.

Mr. Reyes recognized he made a mistake as soon as he was detained. He advised he cooperated with the investigation and also indicated that he did not understand English very well when he signed the form under penalty of perjury. He did not know what "perjury" meant. Had he known what it meant, he would not have taken the test for his friend.

Since he has been out of prison in 1991, he has tried to get his driver's license back. He also reports he has two sons and a wife to support.

Mr. Reyes indicated that if he knew how bad taking the test for his friend was, he would never had done it.

According to Mr. Reyes, he has been with his wife and children since 1994 supporting them. He also indicates that he wanted to receive the plea of three years because he did not want to lose much time from his family. He said he did not understand what a "strike" was and he could not even fathom the idea of serving twenty-five years to life. He knows he has to pay for what he has done, but he does not believe he deserves this type of sentence. If he goes to prison for this long, he will lose his family.

VICTIM'S STATEMENT: The victim in this matter is the State of California, rather than any single, identifiable person.

COLLATERAL REPORTS: There is no collateral information to offer in this matter.

SENTENCING CONSIDERATIONS:

Probation Eligibility (Rule 413):

Statutory provisions limiting or prohibiting a grant of probation in this matter do exist. Specifically, PC 667(e)(2)(A).

Criteria Affecting Probation (Rule 414):

Due to the above statute, this section is not applicable.

Circumstances in Aggravation (Rule 421):

(a) Facts relating to the crime include:

(11) The defendant took advantage of a position of trust or confidence to commit the offense in that he did not carry his own identification card with him when he was taking the test.

(b) Facts relating to the defendant include:

(1) The defendant has, in the past, engaged in violent conduct which indicates a serious danger to society.

(2) The defendant's prior convictions as an adult are numerous.

(3) The defendant has served two prior prison terms.

Circumstances in Mitigation (Rule 423):

(a) Facts relating to the crime include:

(5) The defendant was induced by others to participate in the crime.

Enhancements:

Special Allegations found true pursuant to PC 1170.12(a)-(d) and 667(b)-(i) and 667.5(h).

ANALYSIS: Mr. Reyes has taken his freedom lightly, and again has fallen prey to committing crimes. His trouble began when he was seventeen years old where he was convicted of a first degree burglary in 1981. He was sentenced to two years at the California Youth Authority. He was subsequently paroled in 1982, and once again committed a violent and serious felony in 1986. He was issued a nine year state prison commitment, and was subsequently paroled in 1991. In 1994, he was given a light sentence for committing a petty theft. At that time, he could have served twenty-five years to life, but the court was generous to him. He was subsequently arrested and convicted for a misdemeanor driving under the influence. It is also interesting to note that in 1997, he was arrested for a similar offense of PC 115, Offering False or Forged Instruments. However, he was only convicted of a Misdemeanor Battery.

Although Mr. Reyes is very young, and has a family to support, his two prior serious felonies place him within the meaning of Penal Code Section 607(b)-(i). A mitigating factor is that this offense is not as serious as compared to the other offenses for which he was convicted of. Mr. Reyes is still hopeful that he will be granted a lighter sentence, given that he maintained employment and was supporting his family. He also reported no drug or alcohol use since his last DUI. However, in light of the circumstances, Mr. Reyes comes within the sentencing of the three strikes law.

CVC 13350 RECOMMENDATION:

It is respectfully recommended that the court find that a motor vehicle was not used in the commission of this offense.

REIMBURSEMENT OF APPOINTED COUNSEL:

It is respectfully recommended that the court find that the defendant does not have the present ability to pay appointed counsel fees.

REIMBURSEMENT OF INVESTIGATION COSTS:

It is respectfully recommended that the court find that the defendant does not have the present ability to pay the cost of conducting the presentence investigation and preparing of the court report pursuant to Section 1203.lb of the Penal Code.

REIMBURSEMENT OF ARRESTING AGENCY:

It is respectfully recommended that the court find the defendant not liable for payment of the booking fee pursuant to Government Code 29550.1 in that the arrest was by a state or county agency.

RESTITUTION FINES:

It is respectfully recommended that the defendant, Santos Leone Reyes, be ordered to pay a restitution fine, pursuant to PC 1202.4 in the amount of $400.00 to be collected by the Department of Corrections.

It is further recommended that the defendant, Santos Leone Reyes, be ordered to pay a restitution fine, pursuant to PC 1202.45, in the amount of $400.00. It is further recommended that said order be suspended pending successful completion of parole at which time the fine will be permanently stayed. This fine is to be immediately imposed upon any revocation of parole.

PROBATION OFFICER'S RECOMMENDATION:

It is therefore respectfully recommended that probation be denied and the defendant, Santos Leone Reyes, be sentenced to the California state prison as follows:

COUNT I:	Perjury, in violation of Section 118 PC with the enhancement of 1170.12 (a)-(d) PC and 667(b)-(i)	25 years to LIFE 1 year
	With an additional enhancement of 1170.12(a)-(d) PC and 667(b)-(i)	1 year

The total commitment to state prison is for twenty-seven (27) years to LIFE with credit for time served, a matter of one hundred ninety-five (195) actual days, plus ninety-seven (97) days for conduct, for a total of two hundred ninety-two (292) days, and may be followed by parole for a period of three (3) to four (4) years.

Respectfully submitted,
RAYMOND B. WINGERD
CHIEF PROBATION OFFICER

By: /s/
Lupe Venegas
Probation Officer II

LV:br

APPROVED :
/s/
David Oberhleman
Supervising Probation Officer

I hereby certify that the probation officer's report and recommendation in this matter has been read and considered by me on this 1 day of April, 1998.

/s/

Judge of the Central Regional Trial Court, in and for the Count of San Bernardino, State of California

APPENDIX D

APPENDIX D

[Filed November 19, 1997]

STEVEN MAPES
723 1 Boulder Ave.
Suite 810
Highland, CA 92346
(909) 889-3551

Attorney for Defendant

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN BERNARDINO

)	CASE NO. FSB 16003
THE PEOPLE OF THE)	
STATE OF CALIFORNIA,)	NOTICE OF MOTION
)	TO STRIKE PRIOR
Plaintiff,)	CONVICTION; POINTS
)	AND AUTHORITIES
vs.)	IN SUPPORT OF
)	MOTION
)	
SANTOS REYES,)	DATE: 11-26/97
)	TIME: 8:30
Defendant.)	DEPT. "12"
_____)	

TO: THE DISTRICT ATTORNEY FOR THE COUNTY OF SAN BERNARDINO, CALIFORNIA AND HIS DEPUTIES OF RECORD.

PLEASE TAKE NOTICE that on 11-26-97 at the hour of 8:30 a.m. in Department "12" of the Superior Court, located at 351 North Arrowhead Avenue, San Bernardino, California, counsel for defendant will move at said time and date for an order striking prior convictions of Sections 459 and 211 of the Penal Code, which was rendered in the Superior Court of San Bernardino county, State of California, in 1981 and 1987 respectively.

The motion will be based on this notice of motion, on the memorandum of points and authorities served and filed herewith, on the records on file in this action and on such oral and documentary evidence as may be presented at the hearing on the motion.

DATED: 11-19-97

Respectfully submitted,

/s/
STEVE MAPES
Attorney for Defendant

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS

Mr. Reyes is accused of committing pejury on a DMV application. Mr. Reyes, according to the officer, voluntarily acknowledged that he was taking the test for a cousin of his who had repeatedly taken and failed the exam. He comes before this court with two prior serious or violent felony convictions: 1 in 1981 for PC459 (where he served in the CYA) and another in 1987 for PC 211.

I

UNDER *ROMERO*, A COURT IS AUTHORIZED TO DISMISS A DEFENDANT'S "STRIKE" PRIORS IN THE FURTHERANCE OF JUSTICE UNDER PENAL CODE SECTION 1385.

Penal Code section 1385, subdivision (a) provides, in relevant part,

> "(a) The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed."

The California Supreme Court in *People vs. Superior Court (Romero), supra*, 13 Cal.4th 497, held that trial courts may dismiss "strike" priors in the furtherance of justice under Penal Code section 1385. Under *Romero*, a court may dismiss "strike" priors under Penal Code section 1385 even though the prosecution objects, and does not move for the dismissal.

The Supreme Court made clear that a Penal Code section 1385 dismissal may occur "before, during or after trial, up to the

time judgment is pronounced." (*Romero, supra*, at page 524, fn. 11 quotation omitted.) *Romero* further held that this court must state in its minutes the detailed reasons for exercising its power under Penal Code section 1385.

This court should dismiss the "strike" prior in this case. The furtherance of justice requires no less.

Conclusion

This court has the discretion to strike Mr. Reyes' priors in the interests of justice. This term "interests of justice" seems to be vague. But justice means fairness. Mr. Reyes' crimes have not stayed the same or gotten worse in the last 10 years, rather they have diminished.

The Romero decision outlines 2 formulas by which the sentencing court is to balance interests of justice when considering whether or not to strike a strike. First, formula 1: General test--Balance the constitutional interests for the defendant with the interests of society. Second, formula 2: Balance the defendant's (1) background with the (2) present offense and also with any (3) individualized considerations for the defendant. While the court cannot strike a strike for any of the following reasons standing alone: caprice, whim, antipathy for the 3 strikes law, or judicial economy in plea bargaining (moving the calendar along and reducing the backlog of trials in the courthouse); the court may strike a strike so long as it is able to articulate the reasons, pursuant to the above formulas, for doing so clearly so they might be entered into the minutes of the court as well as the record.

In Mr. Reyes' case some of the considerations under the different categories in the formulas may be repetitive.

Formula 1 : Constitutional Interests of Defendant vs. Interests of Society.

1. Mr. Reyes is currently a nonviolent/nonserious offender faced with the 3 strikes punishment.

2. If sent to prison under 3 strikes, Mr. Reyes will be placed with violent criminals "lifers" in the prison system. This will most definitely put him in situations of physical defense -- "kill or be killed" mentality.

3. Mr. Reyes is not a serious threat to the safety of society.

4. The financial cost to society will be greater if Mr. Reyes is sentenced to life for this nonviolent crime than if he were released at the end of a normal term for this crime. For example, it is estimated that even with plans to build new prisons, there will still not be enough housing for inmates due to the influx of nonviolent Lifers sentenced under the 3 strikes law. Not only are there not enough prisons available, but this is truly a misappropriation of prisons for people who are not a danger to society, but rather themselves.

6. Mr. Reyes has children and a wife. Society has an interest letting Mr. Reyes be a father to his kids and a husband to his wife.

7. And finally, In Mr.Reyes' case in particular, Society has an interest in being protected by a judge from its own political whims and caprices. By protecting Mr. Dubois from this political whim, your Honor will be protecting all of society from its own political immaturity.

Formula 2: Background balanced with the present offense and with individualized considerations.

1. Background:

A. 2 serious or violent felonies and misdemeanor narcotics offenses.

B. Mr. Reyes was a young, immature and irresponsible man well over a decade ago when he committed the offenses which are now strikes.

C. Mr. Reyes' recent crime is in fact a crime which is diminished in severity from the 1987 offense.

2. Present Offense:

A. Pejury on DMV form. Also covered as a misdemeanor under VC§20 and §31.

B. Mr. Reyes immediately admitted wrongdoing upon arrest.

C. Were it not for the strikes, Mr. Reyes–using the "usual circumstances" exception found in the Rules of Court–might be eligible for probation.

3. Individualized Considerations:

A. Father

B. Husband

C. His crimes in fact have diminished in seriousness indicating that while not perfect, Mr. Reyes has "grown up" and now at age 35 is not the danger to society that he once was in his immature mid 20's.

D. Society does NOT have an interest in spending money for locking up a nonpredatory, nondangerous man for life. It will do more harm to society than good.

Mr. Reyes respectfully asks this court to exercise its discretion and strike the strikes.

Dated: 11-19-97

Respectfully submitted,

/s/
STEVEN MAPES
Attorney for Defendant

APPENDIX E

APPENDIX E

[Filed November 7, 2000]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SANTOS L. REYES,	)	NO. ED CV 00-608-VAP(E)
	)	
Petitioner,	)	ORDER DENYING
	)	CERTIFICATE OF
v.	)	APPEALABILITY
	)	
A. CALDERON, Warden	)	
	)	
Respondent.	)	
	)	

The Court has reviewed the Report and Recommendation of United States Magistrate Judge and the other papers on record in these proceedings. For the reasons set forth in the Magistrate Judge's Report and Recommendation, filed September 21, 2000, the Court finds that the Petitioner has not made a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253; Fed. R. App. P 22b; see also Lozada v. Deeds, 498 U.S. 430 (1991); Gardner v. Pogue, 558 F.2d 548, 550 (9th Cir. 1977).

IT IS ORDERED that the Certificate of Appealability is denied.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, by United States mail, on Petitioner and on counsel for Respondent.

DATED: November 7, 2000.

/s/
VIRGINIA A. PHILLIPS
UNITED STATES DISTRICT JUDGE

PRESENTED this 2nd day of
November, 2000 by:

/s/
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

APPENDIX F

APPENDIX F

[Filed October 12, 2000]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SANTOS L. REYES,	)	NO. ED CV 00-608-VAP (E)
	)	
Petitioner,	)	
	)	
v.	)	JUDGMENT
	)	
A. CALDERON, Warden	)	
	)	
Respondent.	)	
	)	

Pursuant to the Order Adopting Findings, Conclusions and Recommendations of United States Magistrate Judge,

IT IS ADJUDGED that the Petition is denied and dismissed with prejudice.

DATED : October 12, 2000

/s/
VIRGINIA A. PHILLIPS
UNITED STATES DISTRICT JUDGE

APPENDIX G

APPENDIX G

[Filed October 12, 2000]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SANTOS L. REYES,	)	NO. ED CV 00-608-VAP (E)
	)	
Petitioner,	)	ORDER ADOPTING
	)	FINDINGS, CONCLUSIONS
v.	)	AND RECOMMENDATIONS
	)	OF UNITED STATES
A. CALDERON, Warden	)	MAGISTRATE JUDGE
	)	
Respondent.	)	
	)	

Pursuant to 28 U.S.C. section 636, the Court has reviewed the Petition, all of the records herein and the attached Report and Recommendation of United States Magistrate Judge. The Court approves and adopts the Magistrate Judge's Report and Recommendation.

IT IS ORDERED that Judgment be entered denying and dismissing the Petition with prejudice.

IT IS FURTHER ORDERED that the Clerk serve copies of this Order, the Magistrate Judge's Report and Recommendation and the Judgment herein by United States mail on Petitioner and counsel for Respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: October 12, 2000.

/s/
VIRGINIA A. PHILLIPS
UNITED STATES DISTRICT JUDGE

APPENDIX H

APPENDIX H

[Filed September 21, 2000]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SANTOS L. REYES,	)	NO. ED CV 00-608-VAP (E)
	)	
Petitioner,	)	REPORT AND
	)	RECOMMENDATION OF
v.	)	UNITED STATES
A. CALDERON, Warden	)	MAGISTRATE JUDGE
	)	
Respondent.	)	
	)	

This Report and Recommendation is submitted to the Honorable Virginia A. Phillips, United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 194 of the United States District Court for the Central District of California.

PROCEEDINGS

Petitioner filed a "Petition For Writ Of Habeas Corpus by a Person in State Custody" on July 26, 2000. Respondent filed an Answer on August 31, 2000. Petitioner did not file a Traverse within the allotted time.

BACKGROUND

A jury found Petitioner guilty of committing perjury on a driver's license application (Reporter's Transcript ("R.T." 202-

203)). The jury further found Petitioner had suffered two prior serious felony convictions (R.T. 203-204). Petitioner received a sentence of 26 years to life, pursuant to California's Three Strikes law (R.T. 217-19).

SUMMARY OF PETITIONER'S CONTENTIONS

Petitioner contends:

(1) Petitioner's sentence constitutes cruel and unusual punishment; and

(2) The trial court abused its discretion by refusing to dismiss any of Petitioner's prior strike convictions.

DISCUSSION

For the reasons discussed herein, the Petition should be denied and dismissed with prejudice.

I. Petitioner's Sentence Does Not Constitute Cruel and Unusual Punishment.

Petitioner argues his sentence is disproportionately severe and therefore constitutes cruel and unusual punishment. This argument must be rejected.

"The threshold determination in the eighth amendment proportionality analysis is whether [Petitioner's] sentence was one of the rare cases in which a . . . comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." United States v. Bland, 961 F.2d 123, 129 (9th Cir. 1992, cert. denied, 506 U.S. 858 (1992) (citations

and quotations omitted); United States v. Harris, 154 F.3d 1082, 1084 (9th Cir. 1998), cert. denied, 120 S.Ct. 86 (1999) ("Comparative analyses of sentences for other crimes is only appropriate in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.") (internal quotations and citations omitted); see Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring) ("The Eighth Amendment does not require strict proportionality between crime and sentence"); see also Cocio v. Bramlett, 872 F.2d 889 (9th Cir. 1989) ("we are required to defer to the power of a state legislature to determine the appropriate punishment for violation of its laws based on principles of federalism, unless we are confronted with a rare case of a grossly disproportionate sentence").

Petitioner's argument fails at this threshold level. A comparison of Petitioner's crime and his sentence does not lead to an inference of gross disproportionality, when the Court considers, as it must, the principle that legislatures may punish recidivists more severely than first-time offenders. United States v. Bland, 961 F.2d 123, 129 (9th Cir. 1992), cert. denied, 506 U.S. 858 (1992) ("In judging the appropriateness of Bland's sentence under a recidivist statute, we may take into account the government's interest not only in punishing the offense of

conviction, but also its interest in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." (citations and quotations omitted) (emphasis added).

Petitioner previously was convicted of residential burglary, armed robbery, petty theft, driving under the influence and battery (R.T. 217-18; Court of Appeal Opinion, Lodgment No. 2, at pp. 7-8). Even where, as here, the current offense is relatively minor, a life sentence resulting from the application of a recidivist sentencing scheme does not constitute cruel and unusual punishment. See, e.g., Rummel v. Estelle, 445 U.S. 263 (1980) (life sentence for obtaining $120.75 by false pretenses, following prior convictions for fraudulent use of a credit card and passing a forged check); McGruder v. Puckett, 954 F.2d 313 (5th Cir. 1992), cert. denied, 506 U.S. 849 (1992) (life without the possibility of parole for stealing beer from a delivery truck); Seritt v. Alabama, 731 F.2d 728 (11th Cir. 1984), cert. denied, 469 U.S. 1062 (1984) (life without the possibility of parole for $300 robbery); Hayes v. Bordenkircher, 621 F.2d 846 (6th Cir. 1980) (life sentence for forging a check in the amount of $88.30).[1/]

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1. Because a comparison of Petitioner's crime and his sentence does not lead to an "inference of gross

II. Petitioner's Claim That the Trial Court Abused Its Sentencing Discretion Under State Law Does Not Warrant Federal Habeas Relief.

Federal habeas corpus may be granted "only on the ground that [Petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Mere errors in the application of state law are not cognizable on habeas corpus. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). Matters relating to sentencing and serving of a sentence generally are governed by state law and do not raise a federal constitutional question. See Miller v. Vasquez, 868 F.2d 1116, 1118-19 (9th Cir. 1989) (question of whether particular prior conviction qualifies for sentence enhancement under California law is not cognizable on federal habeas corpus); see also Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985), cert. denied, 478 U. S. 1021 (1986) (federal habeas relief "unavailable for alleged error in the interpretation or application of state law"); Sturm v. California Adult Authority, 395 F.2d 446, 448 (9th Circuit 1967), cert denied, 395 U.S. 947 (1969)

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disproportionality," the Court need not compare Petitioner's sentence with sentences available for other California crimes or sentences available in other jurisdictions for the crime committed by Petitioner. See United States v. Bland, 961 F.2d at 129. Prior to Harmelin v. Michigan, disproportionality analysis generally required consideration of these matters. See Solem v. Helm, 463 U.S. 277, 292 (1983).

("a state court's interpretation of its [sentencing] statute does not raise a federal question"). "[S]tate courts are the ultimate expositors of state law." Mullaney v. Wilbur, 421 U.S. 684, 691 (1975); see also Oxborrow v. Eikenberry, 877 F.2d 1395, 1399 (9th Cir.), cert. denied, 493 U.S. 942 (1989) .

In the present case, the trial court reflected upon Petitioner's lengthy criminal history and declined to dismiss any of Petitioner's prior strike convictions (R.T. 217-19). Petitioner has failed to demonstrate that the trial court's decision effected any error of California state law, much less any error of constitutional dimension. See Walker v. Newland, 1998 WL 328620 at *3 (N.D. Cal. June 11, 1998) (denying habeas relief where Superior Court indicated it would not exercise discretion to dismiss strike); see generally Walker v. Endell, 850 F.2d 470, 476 (9th Cir. 1987), cert. denied, 488 U.S. 981 (1988) ("Generally, a federal appellate court may not review a state sentence that is within statutory limits").

RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this Report and Recommendation; and (2) directing that Judgment be entered denying and dismissing the Petition with prejudice.[2/]

DATED: September 21, 2000.

/s/

CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

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2. As the foregoing discussion demonstrates, the Petition should be denied because Petitioner is not "in custody in violation of the Constitution or laws or treaties of the United States," within the meaning of section 2254(a) of Title 28 U.S.C. The Court need not and does not reach the issue of whether the Petition also should be denied on the alternative ground that the Petition fails to satisfy the requirements of section 2254(d) of Title 28 U.S.C., as amended by the "Antiterrorism and Effective Death Penalty Act of 1996." See Van Tran v. Lindsey, 212 F.3d 1143 (9th Cir. 2000), pet. for cert. filed, 69 USLW 3156 (Aug. 11, 2000).

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

APPENDIX I

APPENDIX I

EXCERPT FROM REPORTER'S TRANSCRIPT OF ORAL PROCEEDINGS FROM REYES' DIRECT APPEAL IN STATE COURT, CASE NUMBER E022744

SAN BERNARDINO, CALIFORNIA,
THURSDAY, APRIL 2, 1998
8:30 A.M.

[211-219]

DEPARTMENT NO. 12 HON. BRIAN S. McCARVILLE, JUDGE

APPEARANCES:

The Defendant with his Counsel,

JULIAN DUCRE, Attorney at Law; RICHARD YOUNG, Deputy District Attorney of San Bernardino County, representing the People of the State of California.

(Judith L. Morris, Official Reporter, CSR No. 2400.)

--000--

THE COURT: No. 6, Santos Reyes, Case No. 16003.

The Court has read and considered the probation officer's report. It is ordered filed.

Are you ready to proceed?

MR. CANTRELL: Your Honor, that's Mr. Ducre's case. He was here just a few moments ago. Why don't I give him the probation report, the interpreter can read it to him, and then put it on second call.

THE COURT: Please review the probation report, sir, with the interpreter.

*****

THE COURT: No. 6, Santos Reyes, Case No. 16003.

MR. DUCRE: Julian Ducre for Mr. Reyes, who is present in custody.

THE COURT: This is the time and place set for sentencing. The Court has read and considered the probation officer's report. It is ordered filed.

Ready to proceed, sir?

MR. DUCRE: Yes, your Honor.

THE COURT: Waive arraignment for judgment?

MR. DUCRE: So waived.

THE COURT: Any legal cause?

MR. DUCRE: No legal cause.

THE COURT: Anything that you wish to say, sir?

MR. DUCRE: Yes, your Honor. I'm aware it's been discussed with the Court prior by myself that the Romero motion has been filed in this matter and that the Court offered my client four years on this deal.

THE COURT: Actually, so that it's clear, this case came up on conference to the Court and negotiations were engaged in and there was a potential that had there been a plea at an early stage of the proceeding that under Romero the Court may

consider striking a prior as one of the grounds set forth in Romero, and the defendant did not seek to engage or involve himself in that,particular plea in an attempt to resolve the case.

It went back I think for preliminary hearing and it came up again for further discussions. The Court declined to do anything without a written Romero motion. Counsel were required to file a written Romero motion.

MR. YOUNG: I might also note that subsequent to Romero there's been other cases that indicate that perhaps plea bargaining of strikes is inappropriate.

THE COURT: This wasn't a plea bargain of a strike. It was coming up on a conference. And this was prior to Williams. But it came up and in fact at that juncture there was no opposition by the district attorney. It was discussion by the Court that a plea at an early stage of the proceedings, this would be something that the parties would engage in. The defendant did not wish to do that. We sent it back from conference to preliminary hearing.

It came back here for trial. Then a formal Romero motion was filed, heard, and denied, and we had the trial. Now, I think it's always appropriate -- there has been a change in the law. Williams was not out then at the time of the formal Romero motion, and it's always appropriate I think for the Court to look

at it at any time. So I'm going to allow counsel to address the issues.

MR. YOUNG: One other thing I had. Since I wasn't the trial counsel, wasn't present at the conference, I've looked over the notes. I don't see anything that enlightens me as to that. But I know it's the Court's general policy to make some type of record in accordance with Alvernaz to indicate that, if there is some offer, that if there's a rejection of that offer it's likely not to be renewed, and at the same time tell the defendant what his potential exposure is by rejecting the offer.

THE COURT: That was done on more than one occasion, at the conference stage and, also I think at the Romero hearing, I think that was discussed with the defendant present, with the interpreter present. And at one point one of his attorneys -- Mr. Mapes, I think -- was specially brought on board because Mr. Mapes was Spanish speaking and could communicate without the necessity of an interpreter.

Mr. Ducre.

MR. DUCRE: Yes, your Honor. This gentleman before the Court is not a particularly bright person. I'm going to make some statements to the Court based upon information from my client, and I was not present at those proceedings, so I would ask the Court please not take that I'm saying something about those proceedings based on knowledge because I don't know.

If there's any misrepresentation, it's not my intent, but as my client is stating.

When the offer was made, he was not understanding and he wanted to try and get three years instead of four years, and he didn't fully understand that he had to accept it or -- and if he didn't want to accept four years that there was no negotiations on his behalf.

Now, since the Court is already aware, and I see the probation report here, about his history, and on page 1 of that report dated April 2nd it breaks out very clearly his prior and substantial criminal history with the law. Age seventeen he has a first-degree burglary. And in 1986 he had an armed robbery. He has two other misdemeanors and another felony 666 on the prior.

This incident, your Honor, I want to address the thrust of my argument to the particular crime and the punishment therefor and ask the Court that he be -- that the punishment fit the crime. This was not a violent crime, filling out a DMV application under penalty of perjury. He was induced out of compassion for a friend to help him get his driver's license. Nonetheless, it is a crime. He is responsible for that.

We look at his history after 1986, where he was sentenced to nine years, and he's not escalating. Even though he's still

committing crime, the seriousness, there's no violence, the seriousness is decreasing.

Now, based upon the statute, the exposure is sixteen years -- I'm sorry, sixteen months, two years, and three years. He's further looking at two one-year enhancements. Given the high term on that conviction of three years doubled by --

THE COURT: There was only one one-year enhancement. Probation is in error on that.

MR. DUCRE: Then he would be looking at three years doubled, it would be six years, and seven years with the enhancement. And I would ask the Court to take a look at the purpose of the three strikes legislation with the intent to put away felons who are, out there doing serious and violent crimes, and that a twenty-six year to life sentence in this case would be cruel and unusual punishment. And I would ask that the Court sentence him to a seven-year state prison commitment.

Thank you for hearing me, your Honor.

THE COURT: Thank you.

Mr. Young.

MR. YOUNG: I disagree with Mr. Ducre's indication of what the legislative and initiative intent was behind the three strikes. It is to take recidivist defendants off the street. He fits perfectly into that category. He has had an entire life of criminal activity, with the only breaks being incarceration. He has a prior

offense, arrest for 115. This is not an unsophisticated defendant who just blithely goes through life and occasionally accidentally commits crimes. This is a person who goes out and commits crimes on a continuing basis.

And the punishment in fact fits his criminal history. Not particularly the crime, but his criminal history. And that's the design behind the three strikes law, not just people who commit violent and serious felonies on their current offense, but those who have committed and continue to commit crimes. And he fits into that category as though it was tailored for him. And he should get exactly the statutory amount, twenty-five years to life, consecutive to one year for his one-year prior enhancement.

THE COURT: Mr. Ducre, anything further, sir?

MR. DUCRE: I don't think it would benefit society in housing and punishing this man twenty-five years to life. He does have a work history and a showing over the past three years. He is married with two minor children. And I think society would be better benefitted by punishing him for the seven years and let him get back out there and live a straightforward life instead of being put away for twenty-five years or, in essence, condemning this man to virtually life in prison.

He's presently thirty-five years old, and a twenty-six year commitment, you know, is tantamount to life. You know, the

odds are that if he comes out of prison -- I don't know, but I think society would be better served by punishing him for this particular offense, letting the punishment fit the crime.

He is showing, though it be a strained argument, he's showing some signs of rehabilitation in that he is working, this crime was motivated by the fact that, hey, help me get my driver's license and I'll let you work for me, which for him was a better job to better support his family.

And I thank the Court for hearing me.

THE COURT: Mr. Reyes, sir, is there anything you want to tell me?

THE DEFENDANT: Yes, sir.

THE COURT: Go ahead.

THE DEFENDANT: I would like to tell you that if my past life -- my past life was not very good, but that was when I was drunk. Now I am more mature, and I am putting myself in God's hands completely. And I ask you to sentence me, to sentence me fairly. I know that I committed the crime.

That's all, sir.

THE COURT: All right. At first blush, Mr. Ducre's argument that we should put you in for a certain period of time and then let you out to be a productive member of society has some initial good response from me. The problem is we've tried that. We've tried it in 1981, you were put in the youth authority.

Sure, you were young. You committed a serious felony, dangerous felony, violent felony, and did two years.

You got out. You got probation again, albeit for a misdemeanor, drugs this time. Your probation was revoked a couple of times.

Then in '86 you got nine years in state prison for robbery using a weapon. You would think that would have gotten your attention. It didn't, because you got out and immediately committed another theft offense where you went to prison. You would think that would have gotten your attention. It didn't.

You get out and pick up a misdemeanor driving under the influence, were placed on probation. And then your comments that you're getting older now again doesn't work very much for sympathy in this case, because in September of '97 you have another arrest for perjury and 115, false forged documents, albeit a misdemeanor conviction.

So I think I tend to agree with Mr. Young. You're exactly the person or one of the persons that the three strikes legislation was designed to deal with. You're just a criminal. You're a thief, a liar, and a drug user, and an alcohol abuser. The world is not safe with you out on the street. I'm convinced of that.

So I'll treat Mr. Ducre's request as another motion under Williams and Romero to strike a prior. And I find no basis in the law for striking the prior in this case. You are exactly one of

the people the voters, at least in my mind, and the legislature had in mind when they passed this law. You need to be kept off the streets for as long as possible.

This was a jury trial. The Court will announce its tentative. It's bound by the law here. The crime is sixteen months, two, or three years in state prison. Two strikes having been found true by the jury, the punishment would be life in prison, minimum of twenty-five years before parole eligibility. They found a one-year prison prior to be true.

The Court would deny probation. The defendant is statutorily ineligible for a grant of probation. The Court would impose one year for the 667.5(b) prior. Consecutive to that the Court would impose the term prescribed by law, that is, life in prison, and fix the minimum parole consideration as an actual twenty-five years before parole consideration. That would be consecutive to the one-year prison term.

The net would be twenty-six years to life in state prison.

Anything further, Mr. Ducre?

MR. DUCRE: Time credits?

THE COURT: I'll get to those. But anything further about the Court's sentence?

MR. DUCRE: Na, your Honor.

THE COURT: Mr. Young?

MR. YOUNG: No.

THE COURT: The Court's tentative becomes the sentence in this particular case.

The Court awards credit for time served as follows: 195 days actual, 97 conduct, total of 292.

If you are ever released from state prison, sir, you could be on parole for a maximum of life.

The Court orders a $5,000 restitution fine. Based upon the time in prison that's a reasonable amount; $5,000.

APPENDIX J

APPENDIX J

[Filed June 9, 1999]

NOT TO BE PUBLISHED

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent,	E022744
v.	(Super.Ct.No.FSB 16003)
SANTOS LEONE REYES, Defendant and Appellant.	**OPINION**

APPEAL from the Superior Court of San Bernardino County. Brian S. McCarville, Judge. Affirmed.

Howard J. Specter, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Gil P. Gonzalez and David Delgado-Rucci, Deputy Attorneys General, for Plaintiff and Respondent.

1. Introduction

Defendant Santos Leone Reyes (defendant) appeals from a judgment convicting him of committing perjury by using a

false name on a driver's license application. (Pen. Code, § 118.) Pursuant to the Three Strikes law, the trial court sentenced defendant to a total of 26 years to life in state prison. On appeal, defendant contends that the trial court abused its discretion under Penal code section 1385[1/] by refusing to dismiss defendant's prior strike convictions. Defendant further contends that his prison sentence of 26 years to life constitutes cruel and unusual punishment under the state and federal constitutions. Finding no abuse of discretion and no constitutional violation, we affirm the judgment.

2. Facts

On September 18, 1997, defendant filled out a driver's license application at the Department of Motor Vehicles (DMV) using the false name, "Miguel Soto" (Soto).[2/] Defendant signed the form which stated that the information was being provided under penalty of perjury. While defendant was taking the written driving test, a DMV employee caught defendant using a crib sheet. The DMV employee informed defendant that he would have to start all over. Before the employee could explain

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1. All further statutory references are to the Penal Code unless otherwise stated.

2. Defendant claimed that he was trying to take the test for his cousin, Miguel, who did not know how to read and had failed the exam in the past.

what defendant needed to do to start a new application, defendant left the building.

Officer Jose Lopez, who was present on the premises and was immediately informed of defendant's behavior, followed defendant and took him into custody. Defendant's wallet, which defendant attempted to discard prior to being placed under custody, contained identification with defendant's true name.

On March 5, 1998, the jury found defendant guilty of perjury in violation of section 118. The jury also found true that defendant had two prior serious or violent felony convictions and one prior prison term conviction. (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d), 667.5, subd. (b).)

On April 2, 1998, at the sentencing hearing, defendant moved the court to exercise its sua sponte power to dismiss defendant's prior strike convictions pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. After denying defendant's motion, the trial court sentenced defendant to a total of 26 years to life.

3. Section 1385 Discretion

Defendant argues that the trial court abused its discretion by refusing to dismiss defendant's prior strike convictions.

In *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th 497, the California Supreme Court held that a trial court has the discretion to dismiss a strike on its own motion in the

furtherance of justice under section 1385. *(Id.*, at pp. 530-531.) In *Romero*, the court set forth the following guidelines and principles: "A court's discretion to strike prior felony conviction allegations in furtherance of justice is limited. Its exercise must proceed in strict compliance with section 1385[, subdivision] (a), and is subject to review for abuse. . . .

"'The trial court's power to dismiss an action under section 1385, while broad, is by no means absolute. Rather, it is limited by the amorphous concept which requires that the dismissal be "in furtherance of justice." . . .'

"'From the case law, several general principles emerge. Paramount among them is the rule "that the language of [section 1385], 'in furtherance of justice,' requires consideration both of the constitutional rights of the defendant, and *the interests of society represented by the People*, in determining whether there should be a dismissal. [Citations.]" [Citations.] At the very least, the reason for dismissal must be "that which would motivate a reasonable judge." [Citations.]' [Citation.] 'Courts have recognized that society, represented by the People, has a legitimate interest in "the fair prosecution of crimes properly alleged." [Citation.] "'[A] dismissal which arbitrarily cuts those rights without a showing of detriment to the defendant is an abuse of discretion.' [Citations.]"' [Citation.]

"From these general principles it follows that a court abuses its discretion if it dismisses a case, or strikes a sentencing allegation, solely 'to accommodate judicial convenience or because of court congestion.' [Citation.] A court also abuses its discretion by dismissing a case, or a sentencing allegation, simply because a defendant pleads guilty. [Citation.] Nor would a court act properly if 'guided solely by a personal antipathy for the effect that the three strikes law would have on [a] defendant,' while ignoring 'defendant's background,' 'the nature of his present offenses,' and other 'individualized considerations.' [Citation.]" (*Id.*, at pp. 530-531; *see also People v. Williams* (1998) 17 Cal.4th 148, 159.)

The California Supreme Court's discussion of what constitutes an abuse of discretion dealt with a trial court's dismissal of a prior strike conviction, rather than a trial court's refusal to dismiss a strike. In addressing this distinction, the Fifth Appellate District, in *People v. Benevides* (1998) 64 Cal.App.4th 728, held that an appellate court does not have the authority to review a trial court's refusal to exercise its discretion to dismiss a strike. (*Id.*, at pp. 734-735.) The court reasoned as follows: "When a court exercises its extraordinary power of dismissal, it must explain its action on the record in order to facilitate review and public awareness. [Citations.] There is no similar requirement that a court explain its decision

not to exercise its power to dismiss or strike [Citation.] Further, the extraordinary power to dismiss under section 1385 may be exercised only upon the court's own motion or the motion of the People. Section 1385 does not confer a motion or right to relief upon the defendant. [Citations.] A defendant may, however, informally ask or suggest that the trial court exercise its discretion under section 1385. [Citation.] It follows that since the defendant has no right to make a motion under section 1385, a trial court is under no obligation to rule on such a 'motion.' [Citation.] It further follows that if the court does not exercise its power to dismiss or strike, there is no review available to defendant on appeal. [Citation.]" (*Ibid.*)

In the recent case, *People v. Myers* (1999) 69 Cal.App.4th 305, the Second Appellate District criticized the reasoning in *Benevides* by stating that the decision rested "upon the questionable premise that the denial of a motion to strike a prior conviction is *not* an exercise of discretion. Discretion is the power to make the decision, one way or the other. [Citations.]" (*Id.*, at p. 309.) Rather than dwelling on the *Benevides* case, the Second Appellate District resolved to "continue to review rulings on motions to strike prior convictions when the issue is raised under the deferential abuse of discretion standard." (*Ibid.*)

Based on *Romero* and its progeny, it is yet unclear whether appellate courts have the power to review a trial court's refusal

to exercise its discretion under section 1385. The People argue that under such circumstances, where the trial court neither misunderstood the scope of its discretion nor exercised its discretion with improper motive, a defendant's abuse of discretion claim should be summarily rejected. However, prudence and expediency require that we review the record for any abuse of discretion to avoid the possibility of repetitive future appeals. Thus, regardless to what extent, if any, a trial court's refusal to exercise its discretion is reviewable, an evaluation of the record in the present case leads us to the conclusion that there was no abuse of discretion.

The court in *People v. Williams*, *supra*, 17 Cal.4th 148, set forth the appropriate standard for a court to apply in exercising its discretion under section 1385. "[T]he court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Id.*, at p. 161.) In making this determination, a court abuses its discretion when its decision "'falls outside the bounds of reason' under the applicable law and the relevant facts . . . ." (*Id.*, at p. 162.)

Defendant contends that the circumstances of his present offense justifies the dismissal of one or more of defendant's prior strikes. Defendant claims that he was merely trying to help his cousin, Soto, obtain a driver's license. He further claims that Soto needed the license in order for defendant and Soto to work on roofing jobs together.

On the contrary, at trial, the prosecution argued that defendant was trying to obtain a fake I.D. At the DMV, not only did defendant provide false information on the application, defendant also cheated on the written driver's test. After defendant left the building, he also tried to discard his wallet, which would have exposed his true identity. Thus, defendant's culpability was evident in his own actions.

Furthermore, the nature and circumstances of defendant's past serious or violent felony convictions do not support his section 1385 request for dismissal. In 1981, defendant was convicted of residential burglary. In 1986, defendant was also convicted of armed robbery. The severity and high degree of danger involved in both of these offenses in no way support treating defendant as though he never committed these crimes.

Defendant's background, character and prospects also do not justify the dismissal of a prior strike. In addressing these factors, defendant merely states that he was "thirty-five years old at the time of sentencing and had a wife and two children."

Although these are important considerations, defendant's record fails to demonstrate any effective steps toward rehabilitation and improvement. Despite serving time in prison, including a nine-year sentence for which defendant actually served about four years, defendant failed to remain free from criminal activity. After serving four years for the armed robbery conviction, defendant was paroled in 1991. In 1994, defendant was convicted of a petty theft offense. In 1995, defendant was convicted for driving under the influence. In 1997, defendant was also convicted of a battery offense. After considering defendant's criminal history, the trial court concluded that defendant was exactly the type of person for which the Three Strikes legislation was designed. In the absence of any basis in the record to support defendant's claim that the court abused its discretion under section 1385, we conclude that the court's decision fell well within the bounds of reason under the applicable law and relevant facts.

4. Cruel and Unusual Punishment

Defendant argues that his prison sentence of 26 years to life violates the constitutional mandate against cruel and unusual punishment contained in the Eighth Amendment of the United States Constitution and article I, section 17 of the California Constitution. Defendant contends that his current offense, lying on his driver's license application by using a false

name, does not justify an indeterminate life sentence. Defendant argues that although he was convicted of two serious or violent felonies, a residential burglary and an armed robbery, his other past crimes consist of only misdemeanors and a petty theft offense.

The punishment is unconstitutional under the state Constitution if "it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d (1972) 410,424.) "The *Lynch* court identified three techniques courts used to administer this rule. First, they examined the nature of the offense and the offender. [Citation.] Second, they compared the punishment with the penalty for more serious crimes in the same jurisdiction. [Citation.] Third, they compared the punishment to the penalty for the same offense in different jurisdictions. [Citation.]" (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1136.)

Defendant bases his argument entirely on the first prong. In applying the first prong, we look to the nature of the offense and the offender, with particular emphasis on the degree of danger to society. (*In re Lynch*, *supra*, 8 Cal.3d at p. 425.) The nature of the offense can be determined by considering all the circumstances surrounding the offense, including motive, means, extent of involvement, and the consequences of the

crime. (*People v. Dillon* (1983) 34 Cal.3d 441, 479.) Individual culpability can be demonstrated by factors, including age, criminal history, personal characteristics, and state of mind. (*Ibid.*)

Considered in isolation, a prison sentence of 26 years to life is clearly unwarranted for defendant's perjury offense. However, the punishment was not merely for the present offense, but also for defendant's recidivist behavior. (*See People v. Cartwright*, *supra*, 39 Cal.App.4th at pp. 1136-1137.) California statutes imposing enhanced sentences on repeat offenders have long withstood constitutional challenge. (*See In re Rosencrantz* (1928) 205 Cal. 534,535-536; *People v. Weaver* (1984) 161 Cal.App.3d 119, 125-126.)

In light of defendant's criminal record, we cannot agree with defendant that the sentence imposed shocks the conscience and offends fundamental notions of human dignity.

At sentencing, the trial court, in response to defense counsel and defendant's request for a reduced sentence, stated that defendant had failed to rehabilitate after serving shorter sentences in the past. The trial court also commented that defendant had violated probation at least on two prior occasions. The record reveals that the trial court, in finding that defendant presented a threat to the safety of the community,

decided that the application of the Three Strikes law was appropriate for this defendant.

Although defendant, at age 36, is relatively young, his past criminal conduct supports his current sentence. Defendant has committed two serious or violent felonies. On March 3, 1981, defendant was convicted of committing residential burglary in violation of section 459. In addition, on July 9, 1986, defendant was convicted of committing an armed robbery. (Pen. Code, § 211.) Defendant has also demonstrated recklessness in the past by driving under the influence and using controlled substances. Under these circumstances, defendant presents a high degree of danger to society, and thus, we cannot find that defendant's current sentence constitutes cruel and unusual punishment.

Defendant correctly notes that the second and third prongs of the *Lynch* analysis provide no additional support for his argument. We question whether we are required to go beyond the first prong and compare defendant's punishment with the punishment for more serious offenses in this jurisdiction, and/or the same offense in other jurisdictions. (*See People v. Barnett* (1998) 17 Cal.4th 1044, 1182 [federal and state Constitutions do not require "intercase" proportionality review], cert. den. ___U.S.___ [119 S.Ct. 598]; *see also People v. Ayon* (1996) 46 Cal.App.4th 385, 399 [cruel and unusual punishment

determination can be based on intracase proportionality alone], disapproved on other grounds by *People v. Deloza* (1998) 18 Cal.4th 585, 600, fn. 10.) Even if so, defendant's recidivism is once again controlling. "[I]t is a defendant's 'recidivism in combination with his current crimes that places him under the three strikes law. Because the Legislature may constitutionally enact statutes imposing more severe punishment for habitual criminals, it is illogical to compare [defendant's] punishment for his "offense," which includes his recidivist behavior, to the punishment of others who have committed more serious crimes, but have not qualified as repeat felons.' [Citation.]" (*People v. Cline* (1998) 60 Cal.App.4th 1327, 1338, quoting *People v. Ayon*, *supra*, 46 Cal.App.4th at p. 400, fn. omitted; accord, *People v. Cooper* (1996) 43 Cal.App.4th 815, 826.) "Finally, a comparison of California's punishment for recidivists with punishment for recidivists in other states shows that many of the statutory schemes provide for life imprisonment for repeat offenders, and several states provide for life imprisonment without possibility of parole. California's scheme is part of a nationwide pattern of statutes calling for severe punishments for recidivist offenders. [Citation.]" (*People v. Cline*, *supra*, 60 Cal.App.4th at p. 1338; accord, *People v. Ayon, supra*, 46 Cal.App.4th at p. 400.)

Therefore, under the *Lynch* analysis, we conclude that defendant's sentence does not violate the guarantee against cruel and unusual punishment contained in the state Constitution. Aside from his claim under the state Constitution, defendant also claims that his punishment violates the federal Constitution. The Eighth Amendment of the federal Constitution is violated when a sentence is "grossly disproportionate" to the crime. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 1001.) Under the federal Constitution, state statutes imposing enhanced terms for recidivist behavior have long been upheld. (*Rummel v. Estelle* (1980) 445 U.S. 263, 268.) Rare is the punishment that does not survive gross disproportionality analysis. (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1193.) In this case, defendant has failed to show that his punishment is grossly disproportionate to his recidivist behavior, as demonstrated in his past and present offenses.

5. Disposition

We affirm.

NOT TO BE PUBLISHED

s/Gaut
J.

We concur:

s/Hollenhorst
Acting P.J.

s/McKinster
J.

APPENDIX K

APPENDIX K

[Filed July 16, 1999]

No. E022744

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA)
Plaintiff and Respondent,)
) No. E022744
v .)
)
SANTOS LEONE REYES,)
Defendant and Appellant,)
and Petitioner herein.)
)

PETITION FOR REVIEW

San Bernardino County No. FSB 16003

Judgment dated April 2, 1998
THE HONORABLE BRIAN S. MCCARVILLE, PRESIDING

Appearing for Petitioner
Santos Leone Reyes

HOWARD J. SPECTER
Attorney at Law
State Bar No. 103888
220 Montgomery St., #1063
San Francisco, CA 94104

By Appointment of the
Court of Appeal
Pursuant to the
Appellate Defenders, Inc.
Independent Case System

No. E022744

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA) Plaintiff and Respondent,	)
	) No. E022744
v .	)
	)
SANTOS LEONE REYES, Defendant and Appellant, and Petitioner herein.	)

PETITION FOR REVIEW

TO: THE HONORABLE RONALD GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner, appellant and defendant Santos Leone Reyes respectfully requests a hearing before this court to review the decision of the Court of Appeal, Fourth Appellate District, Division Two which affirmed the judgment.

CASE BELOW

The opinion of the Court of Appeal, Fourth Appellate District, Division Two, filed on June 9, 1998, is attached hereto as Appendix A.

CHRONOLOGY AND JURISDICTIONAL STATEMENT

Following a jury trial, petitioner was convicted of perjury by using a false name on a driver's license application

(Pen. Code[1] sec. 118.) In addition, the jury found to be true allegations that petitioner had suffered two prior strike convictions (secs. 667, subds. (b) (i), 1170.12, subds. (a)-(d)) and one prior felony conviction for which he had served a prior prison term (sec. 667.5, subd. (b).)

Petitioner was sentenced to a prison term of 26 years to life.

Petitioner appealed his convictions to the Fourth Appellate District, Division Two, which affirmed the judgment. This petition is timely filed.

GROUNDS FOR PETITION

1. Review is necessary to settle the important question of law of whether it is cruel and unusual punishment to sentence a third strike defendant to a prison term of 26 years to life when the current underlying offense involved lying on a driver's license application.

2. Review is necessary to settle the important question of law of whether it is an abuse of discretion not to dismiss a prior strike conviction for a third strike defendant when the current underlying offense involved lying on a driver's license application.

RELIEF SOUGHT

Petitioner seeks a hearing so this court may determine (1) that it is cruel and unusual punishment to sentence a third strike

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1. All statutory references hereinafter are to the Penal Code unless otherwise specified.

defendant to a prison term of 26 years to life when the current underlying offense involved lying on a driver's license application, and (2) that it is an abuse of discretion not to dismiss a prior strike conviction for a third strike defendant when the current underlying offense involved lying on a driver's license application.

POINTS AND AUTHORITIES

I. PETITIONER'S SENTENCE OF 26 YEARS TO LIFE WHEN THE CURRENT OFFENSE WAS LYING ON A DRIVER'S LICENSE APPLICATION WAS CRUEL AND UNUSUAL PUNISHMENT

Petitioner was sentenced to a base term of 25 years to life for the perjury count plus 1 year for his prior prison term conviction. (CT 151.) At the sentencing hearing, counsel objected that a term of 26 years to life was cruel and unusual punishment. (RT 215.) Petitioner raised the same issue on review to the Court of Appeal, which rejected the claim. (Appendix A, pp. 11-12.) Based on the fact his current underlying crime was lying on a driver's license application, petitioner requests this court grant review and rule his prison term of 26 year to life is cruel and unusual punishment.

The Eighth Amendment of the United States Constitution prohibits cruel and unusual punishment, while article I, section 17 of the California Constitution prohibits the imposition of punishment that is cruel or unusual. In general, it is the duty of the judiciary to review legislative determinations of periods of incarceration. (In re Lynch (1972) 8 Cal.3d 410, 414.) This is to

ensure that, "the power to prescribe penalties be exercised within the limits of civilized standards." (Id. at 424.)

Under the federal Constitution, the issue is whether the sentence is "grossly disproportionate" to the crime. (Harmelin v. Michigan (1991) 501 U.S. 957, 1001 (opn. of Kennedy, J.); United States v. Bajakajian (1998) 524 U.S. ___, [141 L.Ed.2d 314, 118 S.Ct. 2028].) Under the state Constitution, the issue is whether the sentence "is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (In re Lynch, supra, 8 Cal.3d at 424.) With an indeterminate sentence, it is the maximum term which must pass constitutional scrutiny. (Id. at 417.)

In Lynch, the Court formulated three techniques for evaluating disproportionality: (1) an examination of the nature of the offense and the offender, with particular regard to the degree of danger both present to society; (2) a comparison of the challenged penalty with punishments prescribed in the same jurisdiction for more serious crimes; and (3) a comparison of the challenged penalty with punishments prescribed for the same offense in other jurisdictions. (Id. at 425-428.)

The three Lynch prongs are merely guidelines for determining whether a punishment is cruel or unusual and the importance of each depends on the facts of the particular case. (People v. Ayon (1996) 46 Cal.App.4th 385, 398-399.) A punishment can be deemed cruel or unusual based on the first prong alone. (Id. at 399.) In the instant case, petitioner does base

his argument solely on the first prong. This is because in the context of three strike sentencing, the second prong has been found inapplicable (e.g., People v. Cline (1998) 60 Cal.App.4th 1327, 1338), while the third prong has been found to not weigh in favor of a finding of disproportionality (e.g., ibid.; People v. Ayon, supra, 46 Cal.App.4th at 400.)

In evaluating the nature of the offense, the courts should examine not only the offense in the abstract, but also the facts of the crime in question. (People v. Dillon (1983) 34 Cal.3d 441, 479; People v. Ayon, supra, 46 Cal.App.4th at 398.) Courts should consider the totality of the circumstances, including motive, the way the crime was committed, the extent of the defendant's involvement and the consequences of the defendant's act. (People v. Dillon, supra, 34 Cal.3d at 479; People v. Ayon, supra, 46 Cal.App.4th at 398.)

In evaluating the nature of the offender, courts should ask whether the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics and state of mind. (People v. Dillon, supra, 34 Cal.3d at 479; People v. Ayon, supra, 46 Cal.App.4th at 398.) Specifically in the three strike context, evaluation of the nature of the offender must take into account the defendant's recidivist behavior. (People v. Gray (1998) 66 Cal.App.4th 973, ___, [78 Cal.Rptr.2d 191, 201].)

In the current case, petitioner lied on a driver's license application. Specifically, using a false name, he filled out an application under penalty of perjury at the Department of Motor

Vehicles. Petitioner claimed, both when he was arrested and at trial, that he committed the offense in order to help his cousin get a driver's license. (RT 57, 116-117.) He testified that his cousin needed the license so that the two of them could work on roofing jobs together. (RT 135-138.) The prosecutor, on the other hand, argued to the jury that petitioner was trying to obtain a false i.d. for himself. He based this argument largely on the fact petitioner had signed his own name differently on pieces of identification which he had in his wallet when arrested. (RT 191-192.)

Even assuming petitioner's motive was to get a false i.d., this was hardly an egregious offense. No violence of any kind was involved and no one suffered any loss of property. It cannot be seriously contended that, standing alone, the act of lying on a motor vehicle form is worthy of spending the rest of one's life in prison.

As far as the nature of the offender is concerned, petitioner concededly is a recidivist. But that fact alone does not validate a life sentence. It is well established that recidivist statutes must undergo the same constitutional scrutiny as every other sentencing statute. (See, e.g., Solem v. Helm (1983) 463 U.S. 277, 296; In re Lynch, supra, 8 Cal.3d at 425-429 [striking down life terms for recidivists as cruel and unusual punishment].)

Petitioner's two strikes consist of a residential burglary and an armed robbery. However, the remainder of his record consists only of misdemeanors and one petty theft which was

raised to a felony because of his prior record. (RPO 1.) Even assuming petitioner's record is substantial and serious, it does not justify locking him away for the rest of his life because he lied on a driver's license application in order to get a false i.d.

Simply put, given the nature of this offense, a life term is grossly disproportionate and does shock the conscience and offend basic notions of human dignity. This is true despite petitioner's criminal past. Therefore, under both the federal and state constitutions, petitioner's sentence is cruel and unusual. Review should be granted to remedy this injustice.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO DISMISS ANY OF PETITIONER'S PRIOR STRIKE CONVICTIONS WHEN THE CURRENT UNDERLYING OFFENSE INVOLVED LYING ON A DRIVER'S LICENSE APPLICATION

At sentencing, petitioner moved the trial court to dismiss one of his prior strike convictions pursuant to People v. Superior Court (Romero), supra, 13 Cal.4th 497. (RT 212-213, 218:21-22.) In favor of the motion, petitioner relied primarily on the nature of the present offense and the fact that prior to trial the court had offered him a sentence of 4 years if he pled guilty. (RT 213-215.)

The prosecutor argued petitioner was the type of recidivist for whom the three strikes legislation was designed. (RT 215-216.) The court agreed and, based on petitioner's criminal history, denied the motion to dismiss. (RT 217-218.) The court then sentenced petitioner to a term totalling 26 years to life. (RT

219.) On appeal, petitioner contended the denial of his motion to dismiss was an abuse of discretion. The Court of Appeal disagreed. (Appendix A, pp. 7-8.) Review should be granted to resolve whether a defendant convicted of lying on a driver's license application should ever be sentenced as a third strike defendant.

A trial court has the discretion under section 1385 to dismiss a finding under the Three Strikes Law that a defendant has previously been convicted of a serious and/or violent felony. (People v. Superior Court (Romero), supra, 13 Cal.4th at 530-531.) The decision on whether to dismiss a prior strike is subject to review for abuse of discretion. (People v. Williams (1998) 17 Cal.4th 148, 162.) This standard of review is deferential, but not empty. "[I]t asks in substance whether the ruling in question falls outside the bounds of reason under the applicable law and the relevant facts." (Ibid.)

In Williams, the California Supreme Court set forth certain criteria to guide the trial court's exercise of its discretion with regard to prior strike convictions. "[T]he court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strikes] scheme's spirit, in whole or in part, and hence should be treated as though he had presently not committed one or more felonies and/or had not previously been convicted of one or more serious and/or violent felonies." (Id. at 161.)

Petitioner contends the Williams criteria clearly point to the conclusion he should not have been sentenced as a third-strike defendant. Foremost were the facts of the instant offense, which were discussed in Argument I, supra, the relevant portions of which are hereby incorporated by reference. Whether petitioner was trying to help out his cousin or trying to get a false piece of identification, this was not a relatively serious offense. The crime was totally non-violent and involved simply lying on a DMV application form. There were no individual victims and no loss of property. Absent the prior strikes, the maximum sentence petitioner would have faced for the offense was an upper term of 4 years. (Sec. 126.) Indeed, had petitioner pled guilty, it appears the court would have dismissed one strike and then sentenced him to the mitigated term of 2 years doubled to 4 years. (RT (Marsden hearing) 8; RT 212.)

Given the non-violent nature of the crime, the absence of any loss of property, and the fact that at worst petitioner was trying to get a fake i.d., a base term sentence of 25 years to life was draconian on its face. The facts of the offense by themselves called for dismissal of at least one of the prior strikes.

It is true, as the trial court stated, that petitioner has a criminal history. Petitioner submits his record was not so egregious that it outweighed the minor nature of the current offense. In 1981, at the age of 17 years old, petitioner committed a first degree burglary (his first strike) and was

sentenced to 2 years at the California Youth Authority. On January 18, 1992, he was paroled. (RPO face sheet & p. 1; RT 217.)

In 1984, almost three years after being paroled, petitioner committed a misdemeanor violation of Health & Safety Code section 11550, subdivision (a) – being under the influence of a controlled substance. He received two years of probation, which he apparently violated twice. (RPO 1.) The second probation violation involved his second strike – a 1986 armed robbery. He received a 9 year prison sentence and was paroled in 1991. (Ibid.)

Approximately one year after being paroled, petitioner committed a petty theft. He was convicted of petty theft with a prior and sentenced to 16 months in prison. (Id.)

On November 24, 1995, petitioner was convicted of driving under the influence and sentenced to 3 years of probation. (RPO 1.) In 1997, he was convicted of misdemeanor battery and sentenced to 30 days in jail[2/]. (Ibid.)

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2. The probation report lists the date of the battery as September 18, 1997. The report states that also on September 18, 1997, appellant was arrested and charged with offering a false or forged instrument, perjury and obstructing a police officer. (RPO 1.) The probation report and the trial court concluded these perjury and forgery charges were separate from the current case. (RPO 3-4; RT 218.)

However, the instant offense of perjury was committed on September 18, 1997. It appears likely, therefore, that the forgery and perjury charges mentioned above were those of the

In evaluating criminal background in the Romero context, it must be kept in mind that every defendant who qualifies for three strike sentencing is going to have at least two prior serious or violent felony convictions and thus a considerable criminal background. If the fact of two prior strikes is enough to justify denial of a Romero motion, then a trial court would never abuse its discretion by denying such a motion by a three strike defendant. Obviously, this should not be the case.

Petitioner's criminal history, excluding his two strikes, consists of a misdemeanor violation of being under the influence of a controlled substance, an unknown probation violation, petty theft with a prior, a misdemeanor driving under the influence and a misdemeanor battery. These are not offenses which indicate petitioner is a serious threat to society who should be put away for life. Such a record of recidivism supported two-strike punishment, but not a life term.

With respect to personal characteristics, petitioner was thirty-five years old at the time of sentencing and had a wife and two children. (RPO 2.)

In sum, the various factors outlined in Williams point to the 25 year to life base term in this case as being extremely excessive, particularly the nature of the offense. A second strike sentence would have been severe enough. Under these circumstances, it was an abuse of discretion for the trial court to

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present case and the trial court and probation report were mistaken in this regard.

deny petitioner's motion to dismiss one of his prior strikes.

CONCLUSION

Petitioner Santos Leone Reyes prays this court grant review on the issues of (1) whether it is cruel and unusual punishment to sentence a third strike defendant to a prison term of 26 years to life when the current underlying offense involved lying on a driver's license application, and (2) whether it is an abuse of discretion not to dismiss a prior strike conviction for a third strike defendant when the current underlying offense involved lying on a driver's license application.

DATED: 07/16/99

Respectfully submitted,

_____

HOWARD J. SPECTER
Attorney for petitioner
Santos Leone Reyes

Filed date
May 15 2006

(3)

No. 05-755

IN THE SUPREME COURT OF THE UNITED STATES

S.W. ORNOSKI, Acting Warden,
Petitioner,

- v. -

SANTOS L. REYES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether any prisoner who has received a life sentence under California's Three Strikes law can ever be granted relief in federal habeas corpus on the ground that his sentence violates the Eighth Amendment's proscription on cruel and unusual punishment, in light of *Lockyer v. Andrade*, 538 U.S. 63 (2003).

2. The petition presents the question whether it violates the limitations of 28 U.S.C. § 2254(e)(2) to permit a habeas litigant to develop facts underlying his prior convictions as part of an Eighth Amendment challenge when he never attempted to develop those facts as part of such challenge in the state court. However, as we explain in this brief, that question is not in fact presented by this case.

LIST OF PARTIES

The original parties in the district court and the Ninth Circuit were Santos L. Reyes and A. Calderon, then-Warden of San Quentin State Prison. At the time the initial unpublished opinion was filed in the Ninth Circuit, J.S. Woodford was substituted for A. Calderon, who had succeeded as Warden of San Quentin State Prison. At the time the final published decision was filed in the Ninth Circuit (the judgment being appealed from), Jill Brown was substituted for J.S. Woodford, her predecessor as Warden of San Quentin State Prison. S.W. Ornoski, Acting Warden of San Quentin State Prison, has been substituted for Ms. Brown as petitioner in this Court. Mr. Reyes is the respondent in this Court.

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ARGUMENT 7

I

There is no need for this Court to review the question whether in light of Lockyer v. Andrade, federal habeas corpus relief cannot be granted on cruel and unusual punishment grounds on any California three strikes sentence since (1) this Court in Andrade explicitly held that such relief *could* be granted in an "exceedingly rare" and "extreme" case, and the Ninth Circuit has not held otherwise, and (2) the Ninth Circuit has not granted habeas relief in the instant case, or even indicated that such relief should be granted, thus it would be premature for this Court to step in at this time. 7

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There is no need for this Court to review the claim that it violates 28 U.S.C. § 2254(e)(2) to permit a habeas litigant to develop facts underlying his prior convictions as part of an Eighth Amendment claim when he never attempted to develop those facts as part of such a challenge in state court because (1) the claim is premised on an assumption that Mr. Reyes did not attempt to develop facts underlying his prior convictions in state court, but the record supports no such premise, (2) by remanding the case to the district court for additional fact development and to determine whether relief should be granted in the first instance, the Ninth Circuit has done nothing that violates any statute or conflicts with any precedent, and (3) the proper forum for the state to litigate this claim is in the district court, not this Court. 18

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IN THE SUPREME COURT OF THE UNITED STATES

No. 05-755

S.W. ORNOSKI, Acting Warden,
Petitioner,

- v. -

SANTOS L. REYES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Petitioner presents two questions it asks this Court to review. This Court should decline to review both. With respect to petitioner's first claim – that in light of Lockyer v. Andrade, federal habeas corpus relief cannot be granted on cruel and unusual punishment grounds on any California three strikes sentence – review should be denied because (1) this Court in Andrade explicitly held that such relief *could* be granted in an "exceedingly rare" and "extreme" case, and the Ninth Circuit has not held otherwise, and (2) the Ninth Circuit has not granted habeas relief in the instant case, or even indicated that such relief should be granted, and there is no need for this Court to step in at this time.

Petitioner's second claim – that it violates the limitations of 28 U.S.C. § 2254(e)(2) to permit a habeas litigant to develop facts underlying his prior convictions as part of an Eighth

Amendment claim when he never attempted to develop those facts as part of such a challenge in state court – need not be reviewed by this Court because the issue is simply not presented in this case. Petitioner's claim is premised on an assumption that Mr. Reyes did not attempt to develop facts underlying his prior convictions in state court and may not do so now. But the record supports no such premise. To the contrary, the record suggests that such fact development did occur in the state court and the state may have failed to provide the entire state record to the district court as part of the federal habeas proceedings. Either way, all the Ninth Circuit rather unremarkably has done in this case is to say it cannot properly review the Eighth Amendment claim raised by Mr. Reyes because the record before it is incomplete, and direct the district court "to develop the record further and to determine in the first instance whether Reyes is entitled to relief." (Pet. App. A13). Should the state have a legitimate argument for why Mr. Reyes should be precluded from adducing such evidence, it may raise it and litigate it before the district court. There is no reason for this Court to address a claim that may not exist.

Accordingly, because this Court does not sit to issue advisory opinions nor to engage in error correction, the petition for a writ of certiorari should be denied.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. A1-A17) is reported at 399 F.3d 964 (9th Cir. 2005).

JURISDICTION

The opinion and judgment of the court of appeals was filed on March 4, 2005. A petition for rehearing en banc was denied on October 12, 2005. This petition for a writ of certiorari was filed on December 7, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Factual Background.

On September 18, 1997, Santos Reyes entered the Department of Motor Vehicles ("DMV") office on Waterman Avenue in San Bernardino, California. He filled out an application for a driver's license under the name of his cousin, Miguel Soto, who purportedly knew how to drive but not how to read. Mr. Reyes signed the application, which stated that the information was being provided under penalty of perjury. After Mr. Reyes signed the application, DMV employee Debra Alexander gave him two copies of the written driver's license test. Alexander suspected that Reyes was cheating on the exam by using a "crib sheet." She confiscated the two tests from Mr. Reyes and began filling out paperwork related to Reyes's alleged cheating. Meanwhile, Reyes left the DMV building. Alexander contacted California Highway Patrol Officer José Lopez, who was stationed at the DMV. Officer Lopez followed Mr. Reyes, who was walking away. After catching up with him, Officer Lopez patted-down Reyes and handcuffed him. Mr. Reyes cooperated with Officer Lopez and voluntarily admitted that he had attempted to take the written driver's license test for Soto. The encounter was without violence. (Pet. App. A4-A5).

State Court Proceedings.

On March 2, 1998, Mr. Reyes was arraigned in San Bernardino County Superior Court on an Amended Information, charging him with one count of perjury in violation of Cal. Penal Code § 118, for using his cousin's name on a DMV application.[1] Mr. Reyes was found to qualify for

[1]Rather than charging him with felony perjury, the state could have charged him with the more appropriate misdemeanor offense of violating Cal. Veh. Code § 20: using a false name or making a false statement on any document filed with the Department of Motor Vehicles. (Pet.

California's Three Strikes sentencing enhancement under Cal. Penal Code §§ 1170.12(a)-(d) and 667((b)-(i) because of two prior convictions: one as a juvenile in 1981 for residential burglary in violation of Cal. Penal Code § 459; and one in 1987 for a robbery with a weapon in violation of Cal. Penal Code § 211. (Pet. App. A5).

The State offered Mr. Reyes a deal of four years imprisonment in exchange for a guilty plea to the perjury charge, but Reyes rejected the plea deal and exercised his constitutional right to a jury trial.[2] On March 5, 1998, a jury convicted Mr. Reyes of the perjury charge and found the Three Strikes special allegations true. On April 2, 1998, the trial court refused Mr. Reyes's request to strike one of his prior strikes, and sentenced him to an indeterminate term of twenty-six years to life. (Pet. App. A5-A6).

Mr. Reyes appealed the judgment, claiming, among other things, that his sentence violated the Eighth Amendment's prohibition on cruel and unusual punishment. On June 9, 1999, the California Court of Appeal affirmed Reyes's conviction and sentence. The court indicated that "[c]onsidered in isolation, a prison sentence of 26 years to life is clearly unwarranted for defendant's perjury offense. But the punishment was not merely for the present

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App. 8 n.4). The only reason for the charging decision appears to be the state's desire to seek a three strikes sentence. The Ninth Circuit correctly noted, though, that "[t]he fact that the California legislature deemed making false statements on a driver's license application to be a misdemeanor reflects that Reyes' offense 'is viewed' by society to be among the less serious offenses.'" (Id.) (quoting Solem v. Helm, 463 U.S. 277, 296 (1983)).

[2]In a pre-trial hearing, the trial court also indicated to Mr. Reyes that it had reviewed his attorney's motion to strike one of the priors, and although the court did not "normally commit or make a decision until after someone has been convicted," that were Reyes to go to trial and the priors were found to be true, that the court "would certainly consider striking the older prior, the '81 prior, for some legal reasons because of the age of the prior and other factors that your attorney and the district attorney have disclosed to me," and that "[t]he Court could put you then in prison for eight years." (Dist. Ct. Doc. 15, Exh. A at 4 [Tr. of 12/8/97]).

offense, but also for defendant's recidivist behavior." (Pet. App. J68). In assessing Mr. Reyes's federal Eighth Amendment claim, the court merely stated:

> The Eighth Amendment of the federal Constitution is violated when a sentence is "grossly disproportionate" to the crime. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 1001.) Under the federal Constitution, state statutes imposing enhanced terms for recidivist behavior have long been upheld. (*Rummel v. Estelle* (1980) 445 U.S. 263, 268.) Rare is the punishment that does not survive gross disproportionality analysis. (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1193.) In this case, defendant has filed to show that his punishment is grossly disproportionate to his recidivist behavior, as demonstrated by his past and present offenses.

(Pet. App. J71). On September 1, 1999, the California Supreme Court denied Reyes's petition for review without explanation. (Pet. App. A6, B18).

Federal Habeas Corpus Proceedings.

On July 26, 2000, Mr. Reyes timely filed a 28 U.S.C. § 2254 habeas corpus petition in the United States District Court for the Central District of California. On September 21, 2000, Magistrate Judge Charles F. Eick issued a report and recommendation urging that Reyes's petition be dismissed with prejudice. On October 12, 2000, United States District Judge Virginia A. Phillips adopted the report and recommendation and dismissed Mr. Reyes's petition. The district court also denied his request for a certificate of appealability. (Pet. App. A6, E34-E35, F36, G37-G38, H39-H46).

Court of Appeals Proceedings.

On October 31, 2000, Reyes timely filed a notice of appeal and a request for certificate of appealability. On May 2, 2001, the United States Court of Appeals for the Ninth Circuit granted Reyes a certificate of appealability on the limited issue whether his Three Strikes sentence

violated the Eighth Amendment. (Pet. App. A6).

Although the Ninth Circuit initially affirmed the district court in an unpublished 2-1 decision, on rehearing, the court in a 2-1 published decision remanded the case to the district court for additional fact development on the circumstances surrounding Mr. Reyes's prior convictions and for the district court to determine in the first instance whether Mr. Reyes is entitled to relief. (Pet. App. A13).

The court first explained that in Ramirez v. Castro, 365 F.3d 755, 756, 770 (9th Cir, 2004), it previously held, relying on Lockyer v. Andrade, 538 U.S. 63, 72-73 (2003), that Eighth Amendment challenges to Three Strikes sentences remain viable in certain "exceedingly rare" cases. In Ramirez, the court applied the Supreme Court's analysis from Solem v. Helm, 463 U.S. 277 (1983), to examine as an initial matter whether the petitioner's extreme sentence is justified by the gravity of his most recent offense and criminal history. The court concluded in Ramirez that the petitioner's sentence did not match the gravity of the triggering offense, or of his prior offenses, and directed that habeas relief be granted.[3] (Pet. App. A7-A9).

Applying that circuit precedent to Mr. Reyes's case, the court concluded that Mr. Reyes's sentence also did not match the gravity of his triggering offense of falsifying a driver's license application which was nonviolent and not a crime targeted at another individual, especially since the California legislature has deemed making a false statement on a driver's license application to be a misdemeanor, and thus reflects that the offense is viewed by society as among the less

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[3]The California Attorney General did not seek review of the Ramirez decision in "the interest of justice," and called it an "exceedingly rare case." (Pet. App. 7 n.3 (citing Henry Weinstein, *Lockyer Gives Up Three-Strikes Case*, L.A. Times, Apr. 30, 2004, at B6, *available at* 2004 WL 55909787)).

serious offenses. (Pet. App. A8). The court concluded, however, that it did not have enough information about the circumstances surrounding Mr. Reyes's armed robbery conviction but that "[t]he paucity of detail in the record indicates that this offense may have been non-violent." (Pet. App. 9-10). Because it believed that "but for Reyes' armed robbery conviction, Reyes would appear to have a plausible case for relief," but the record before the court was insufficient for it to conduct a proper analysis, the court "remand[ed] for the district court to develop the record further and to determine in the first instance whether Reyes is entitled to relief." (Pet. App. A12-A13).

ARGUMENT

I

There is no need for this Court to review the question whether in light of Lockyer v. Andrade, federal habeas corpus relief cannot be granted on cruel and unusual punishment grounds on any California three strikes sentence since (1) this Court in Andrade explicitly held that such relief *could* be granted in an "exceedingly rare" and "extreme" case, and the Ninth Circuit has not held otherwise, and (2) the Ninth Circuit has not granted habeas relief in the instant case, or even indicated that such relief should be granted, thus it would be premature for this Court to step in at this time.

In Lockyer v. Andrade, 538 U.S. 63, 72 (2003), this Court expressly held that "one governing legal principle emerges as 'clearly established' under [28 U.S.C.] § 2254(d)(1): A gross disproportionality principle is applicable to sentences for terms of years." Thus, the Court explained that in that particular case, "the only relevant clearly established law amenable to the 'contrary to' or 'unreasonable application of' framework is the gross disproportionality principle, the precise contours of which are unclear, applicable only in the 'exceedingly rare' and 'extreme'

case." Id. at 73 (citing Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment); Solem v. Helm, 463 U.S. 277, 290 (1983); Rummel v. Estelle, 445 U.S. 263, 272 (1980)). So, despite the state's protestations, it is simply not the case that this Court "implicit[ly]" held "that a federal habeas court cannot find a state court ruling upholding an Eighth Amendment challenge to a sentence properly imposed under California's Three Strikes law contrary to, or an unreasonable application of, this Court's clearly established precedent." (Pet. 8). The state has apparently read into Andrade something that it would like to be there, but isn't.

Plainly, in the "exceedingly rare" and "extreme" case, it remains the case that a sentence may be grossly disproportionate – and a state court's contrary conclusion may be an objectively unreasonable application of that clearly established law. Moreover, as this Court has explained, a state court decision is contrary to clearly established precedent "if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." Williams v. Taylor, 529 U.S. 362, 405-06 (2000). Thus, were a case to involve a set of facts materially indistinguishable from this Court's decision in Solem v. Helm, for example, in which a sentence was found to be grossly disproportionate, a state court's decision otherwise could be set aside on habeas review under 28 U.S.C. § 2254(d)(1). Finally, what constitutes "clearly established law" under § 2254(d)(1) "is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." Andrade, 538 U.S. at 72-73 (citing Williams, 529 U.S. at 405, 413; Bell v. Cone, 535 U.S. 685, 698 (2002)). Thus, although the state here argues that this Court's decision in Ewing v. California, 538 U.S. 11 (2003), "has little, if any, precedential value

regarding federal habeas corpus review of an Eighth Amendment challenge to a sentence under California's Three Strikes law," (Pet. 10), the Court's decision there is something state courts must consider since the time Ewing was issued – and any future decisions of the Court defining the contours of the gross disproportionality principle must similarly be considered.

Significantly, the state's primary argument for why this case warrants review by this Court – even though the Ninth Circuit has not granted habeas relief in this case and habeas relief may never be granted in this case – is its belief that "the Ninth Circuit's recent decisions confirm that the court continues to misunderstand the scope of federal habeas corpus review, and therefore needs additional guidance." (Pet. 5). It maintains that the Ninth Circuit has "failed to be guided by the criteria presented in this Court's most recent opinion concerning habeas review of Eighth Amendment challenges in California, (Pet. 11), and that the court's decision in the instant case foretells "inconsistent outcomes dependent on how different panels choose to parse facts." (Pet. 10). Indeed, it stresses that even though this Court in Andrade said an Eighth Amendment challenge to a three strikes sentence would be viable in only an exceedingly rare case, "in the two years since this Court issued the decision in Andrade, the Ninth Circuit has [already] identified three cases that it feels potentially qualify as exceedingly rare," the instant case, Ramirez v. Terhune, 128 Fed. Appx. 663 (2004), a case in which the state is simultaneously seeking a writ of certiorari (No. 05-736), and Ramirez v. Castro, 365 F.3d 755 (9th Cir. 2004). (Pet. 10). But the state's rhetoric is belied by reality. Its argument is misleading and fails to give the entire picture.

Contrary to the state's suggestion, the Ninth Circuit has in fact only found an Eighth Amendment violation in the "exceedingly rare" case, granting relief only ***once*** since this Court's

decision in Andrade. See Ramirez v. Castro, 365 F.3d 755 (9th Cir. 2004). Notably, the state did not seek review of Ramirez v. Castro, publicly stated it believed it was an "exceedingly rare case," and acknowledged that relief was appropriate there. (Pet. App. A7 at n.3 ("We note that the California Attorney General declined to seek further review of our decision in *Ramirez*, stating that he was acting 'in the interest of justice' and calling *Ramirez* an 'exceedingly rare case.'") (citing Henry Weinstein, *Lockyer Gives Up Three-Strikes Case*, L.A. Times, Apr. 30, 2004, at B6, *available at* 2004 WL 55909787)).

By contrast, in that same time period the Ninth Circuit, relying on Andrade, has consistently and repeatedly – indeed, at least eighty times – ***denied*** relief to a California three strikes prisoner raising an Eighth Amendment challenge to his or her life sentence, even where the petitioner had a minor triggering offense.[4] See Earle v. Runnels, No. 05-15739, 2006 WL 1049733 (9th Cir. Apr. 21, 2006) (unpublished) (receiving stolen property [a 16 year old motorcycle]); French v. Duncan, No. 04-57067, 2006 WL 679932 (9th Cir. Mar. 15, 2006) (unpublished) (shoplifting $31 worth of cigarettes); Aguirre v. Hubbard, 167 Fed. Appx. 668 (9th Cir. 2006) (possession of 0.1 gram of methamphetamine); Wallace v. Kramer, 149 Fed. Appx. 690 (9th Cir. 2005) (possession of less than half of a gram of cocaine); Hernandez v. Almeida, 146 Fed. Appx. 934 (9th Cir. 2005) (possession of 0.66 gram of cocaine); Rico v. Taylor, 146 Fed. Appx. 143 (9th Cir. 2005) (purse snatching); Webb v. McGrath, 146 Fed. Appx. 131 (9th Cir. 2005) (forgery); Nutt v. Knowles, 145 Fed. Appx. 221 (9th Cir. 2005) (50 years to life for two

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[4]This only includes those cases in which either the district court or the Ninth Circuit had granted a certificate of appealability. It does not include the numerous other cases with Eighth Amendment claims where the court concluded that not even a certificate of appealability was warranted.

counts of pandering); LaCroix v. Harris, 139 Fed. Appx. 866 (9th Cir. 2005) (shoplifting five cartons of cigarettes); Rodriguez v. Lewis, 132 Fed. Appx. 134 (9th Cir. 2005) (petty theft of two candy bars and package of cheese worth about $4); Crutcher v. Garcia, 131 Fed. Appx. 116 (9th Cir. 2005) (grand theft auto); Skinner v. Roe, 130 Fed. Appx. 909 (9th Cir. 2005) (225 years to life for multiple nonviolent theft-related offenses); Sigala v. Campbell, 130 Fed. Appx. 129 (9th Cir. 2005) (driving under the influence); Amico v. Alameida, 122 Fed. Appx. 357 (9th Cir. 2005) (multiple theft-related offenses); Nible v. Terhune, 119 Fed. Appx. 53 (9th Cir. 2004) (resisting a park ranger); Crawford v. Small, 116 Fed. Appx. 876 (9th Cir. 2004) (second degree burglary); Rios v. Garcia, 390 F.3d 1082 (9th Cir. 2004) (petty theft of two watches with combined value of $79.98); Jones v. Castro, 111 Fed. Appx. 942 (9th Cir. 2004) (escape without force or violence); Wrobleski v. Guirbino, 111 Fed. Appx. 934 (9th Cir. 2004) (petty theft with a prior); Alfred v. Galaza, 108 Fed. Appx. 554 (9th Cir. 2004) (reckless driving while evading a peace officer); Bonner v. Cambra, 105 Fed. Appx. 147 (9th Cir. 2004) (shoplifting tool set priced at $199.99 and car polisher priced at $59.99); Mason v. Hamlet, 94 Fed. Appx 575 (9th Cir. 2004) (95 years to life for two counts of first degree burglary and one count attempted first degree burglary); Guzman v. Adams, 88 Fed. Appx. 215 (9th Cir. 2004) (petty theft of Sony Walkman); Caliendo v. Warden of California Men's Colony, 353 F.3d 1147 (9th Cir.) (second degree auto burglary), opinion withdrawn and superseded on denial of rhrg., 365 F.3d 391 (2004) (granting relief on other grounds); Gonzales v. Terhune, 84 Fed. Appx. 931 (9th Cir. 2003) (residential burglary); Bryant v. Adams, 83 Fed. Appx. 260 (9th Cir. 2003) (shoplifting $24 worth of underwear), cert. denied, 541 U.S. 1017 (2004); Quinones v. Garcia, 83 Fed. Appx. 259 (9th Cir. 2003) (75 years to life for possession of heroin for sale and possession of firearm by felon); Butler v. Hernandez, 83

Fed. Appx. 219 (9th Cir. 2003) (petty theft with a prior); Duenas v. Galaza, 83 Fed. Appx. 180 (9th Cir. 2003) (shoplifting six bottles of beer); Clark v. Lamarque, 82 Fed. Appx. 522 (9th Cir. 2003) (indecent exposure); Anderson v. Lamarque, 81 Fed. Appx. 257 (9th Cir. 2003) (shoplifting $40 worth of clothing); Joseph v. Lewis, 81 Fed. Appx. 214 (9th Cir. 2003) (possessing $5 quantity of rock cocaine); Prince v. Adams, 80 Fed. Appx. 570 (9th Cir. 2003) (engaging in consensual sexual intercourse with 16 year old girlfriend); Reed v. Roe, 79 Fed. Appx. 991 (9th Cir. 2003) (failing to re-register as a sex offender after changing address); Huegerich v. Lamarque, 78 Fed. Appx. 610 (9th Cir. 2003); Barries v. Larson, 78 Fed. Appx. 7 (9th Cir. 2003) (grand theft); Pena v. Terhune, 77 Fed. Appx. 935 (9th Cir. 2003) (shoplifting wallet and pair of shoes with combined total value of $35.98); Clayton v. Fairman, 76 Fed. Appx. 186 (9th Cir. 2003) (burglary); Marshall v. Clark, 73 Fed. Appx. 975 (9th Cir. 2003) (shoplifting two bottles of liquor); Williams v. Galaza, 73 Fed. Appx. 941 (9th Cir. 2003) (shoplifting two pairs of jeans with total value between $60 and $64); Johnson v. Mueller, 73 Fed. Appx. 304 (9th Cir. 2003) (transportation of 0.16 gram of heroin); Clarke v. Galaza, 73 Fed. Appx. 296 (9th Cir. 2003) (driving under the influence and reckless driving); Allen v. Roe, 73 Fed. Appx. 291 (9th Cir. 2003) (shoplifting a telephone); LaCroix v. Harris, 73 Fed. Appx. 260 (9th Cir. 2003) (shoplifting two cartons of cigarettes); Webb v. Ylst, 72 Fed. Appx. 716 (9th Cir. 2003) (possession of 0.12 gram of methamphetamine); Varela v. Adams, 72 Fed. Appx. 698 (9th Cir. 2003) (narcotics possession); Smith v. Giurbino, 71 Fed. Appx. 684 (9th Cir. 2003) (possession of cocaine); Gayles-Shealy v. Adams, 71 Fed. Appx. 648 (9th Cir. 2003) (sale of $20 of cocaine base); Aguilar v. Ayers, 69 Fed. Appx. 390 (9th Cir. 2003) (unlawfully driving a vehicle, receiving stolen property, possession of a hypodermic needle); Wallace v. Mueller, 68

2003) (evading a police officer with reckless driving); Grayson v. Castro, 68 Fed. Appx. 794 (9th Cir. 2003) (50 years to life for receiving an access card without consent, forgery, second degree burglary); Blanton v. Terhune, 68 Fed. Appx. 119 (9th Cir. 2003) (possession of less than 0.1 gram of methamphetamine); Shirley v. Small, 68 Fed. Appx. 117 (9th Cir. 2003) (possession of 6.8 grams of cocaine for sale); Dodd v. Terhune, 68 Fed. Appx. 111 (9th Cir. 2003) (31 years to life for shoplifting two videotapes and a bottle of liquor); Morgan v. Rice, 68 Fed. Appx. 111 (9th Cir. 2003) (shoplifting a baseball glove); Gregory v. Ratelle, 68 Fed. Appx. 45 (9th Cir. 2003) (burglary of a vehicle and petty theft with a prior); Thomas v. Clarke, 68 Fed. Appx. 14 (9th Cir. 2003) (receiving stolen property [checks and a license plate]); Baxter v. Roe, 67 Fed. Appx. 493 (9th Cir. 2003) (shoplifting tools); King v. Clarke, 67 Fed. Appx. 460 (9th Cir. 2003) (shoplifting two cartons of cigarettes); Bailey v. Castro, 66 Fed. Appx. 103 (9th Cir. 2003) (commercial burglary); Cook v. Galaza, 65 Fed. Appx. 106 (9th Cir. 2003) (possession of 0.16 gram methamphetamine); Turner v. Candelaria, 64 Fed. Appx. 647 (9th Cir. 2003) (receiving stolen property); Rico v. Terhune, 63 Fed. Appx. 394 (9th Cir. 2003) (shoplifting a television set worth $130); Jones v. Taylor, 63 Fed. Appx. 330 (9th Cir. 2003) (shoplifting clothing); Walters v. Fairman, 62 Fed. Appx. 190 (9th Cir. 2003) (two counts of shoplifting [a shirt and a piece of software]); Samuel v. Lewis, 62 Fed. Appx. 190 (9th Cir. 2003) (50 years to life for two counts of petty theft with a prior); Robinson v. Lewis, 62 Fed. Appx. 188 (2003) (possession of 1.31 grams of cocaine base for sale); Aguirre v. Lewis, 62 Fed. Appx. 187 (9th Cir. 2003) (commercial burglary); Venson v. Lewis, 62 Fed. Appx. 186 (9th Cir. 2003) (vehicle code violations [unlawfully driving a vehicle and evading an officer]); Johnson v. Finn, 62 Fed. Appx. 185 (9th Cir. 2003) (35 years to life for residential burglary and petty theft with a prior); Benscoter v.

McGrath, 62 Fed. Appx. 184 (9th Cir. 2003) (shoplifting pair of tennis shoes); Tolbert v. Roe, 62 Fed. Appx. 184 (9th Cir. 2003) (50 years to life for two counts of second degree commercial burglary and two counts of petty theft with a prior); Andrews v. Lewis, 62 Fed. Appx. 183 (9th Cir. 2003) (shoplifting eight videotapes); Kunkle v. Galaza, 62 Fed. Appx. 182 (9th Cir. 2003) (evading an officer with reckless driving and possession of narcotics paraphernalia); Johnson v. Pliler, 62 Fed. Appx. 180 (9th Cir. 2003) (selling or furnishing 0.15 gram rock cocaine); Romero v. Galaza, 61 Fed. Appx. 492 (9th Cir. 2003) (receiving stolen property); Robles v. Clarke, 61 Fed. Appx. 483 (9th Cir. 2003) (shoplifting a $45 camera); Anderson v. Clarke, 61 Fed. Appx. 482 (9th Cir. 2003) (possession of 6.5 grams of methamphetamine for sale); Collins v. Pliler, 61 Fed. Appx. 479 (9th Cir. 2003) (shoplifting microwave oven worth $189); Le v. Castro, 61 Fed. Appx. 321 (9th Cir. 2003) (possession of $8 worth of narcotics [14 mg. cocaine and 97 mg. heroin]).[5] Given that the Ninth Circuit has granted relief on an Eighth Amendment claim in barely one percent of the California three strikes cases in which it has reviewed such claims in the last three years – and even the state acknowledged that the one case where relief was granted was an "exceedingly rare" case – it can hardly be reasonably argued that the Ninth Circuit is some renegade court gone amok requiring intervention by this Court.

Moreover, the state appears to be complaining that the Ninth Circuit has engaged in an analysis here that is contrary to this Court's decision in Andrade. (Pet. 8). It argues that the Ninth Circuit, by comparing the sentence imposed to the "gravity of the offense, considering both

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[5]The Ninth Circuit has also denied habeas relief from an Arizona three sentence since Andrade. See Kenyatta v. Stewart, 152 Fed. Appx. 616 (9th Cir. 2005) (aggravated assault with a truck). The court distinguished the case from the instant case on the ground that Mr. Reyes's triggering offense was nonviolent.

the nature of the triggering offense as well as the criminal history," has demonstrated "a fundamental misconception of" Andrade. (Pet. 8). But it is the state that misreads Andrade and this Court's precedents. The Ninth Circuit's post-Andrade analysis in Ramirez v. Castro is entirely appropriate.

In the context of a "three strikes" sentence, whether or not a particular case is the "exceedingly rare" case which violates the Eighth Amendment is entirely dependent on the facts in that case, *i.e.*, the nature and circumstances of both the triggering offense and the defendant's criminal history. To determine whether or not a defendant's crime and criminal history make the sentence imposed grossly disproportionate, it is necessary for a reviewing court to look at the facts surrounding each of the offenses involved. That is all the Ninth Circuit has said it needs to do in this case. And that is entirely consistent with this Court's Eighth Amendment jurisprudence.

For example, in Solem – a case that has not been overruled, and remains good law after Andrade – this Court explained that "a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." 463 U.S. at 292. In performing such objective analysis, this Court further endorsed consideration of "other accepted principles that courts may apply in measuring the harm caused or threatened to the victim or society," such as the "absolute magnitude of the crime" and the offender's "culpability." Id. In Harmelin, Justice Kennedy's concurring opinion, which later guided the Court in its analyses in Ewing and Andrade, compared the nature and circumstances of the

offenses committed by the defendant there to other Eighth Amendment cases, particularly looking to whether an offense was "relatively minor" or "nonviolent." Harmelin, 501 U.S. at 1001, 1002. In Ewing, the plurality looked beyond the mere fact of conviction as part of its analysis, noting that Ewing's conduct in his prior strikes involved accosting a victim in the mail room of an apartment complex, claiming to have a gun before forcing the victim back to his apartment at knife-point to steal the victim's money and credit cards. 538 U.S. at 19. The plurality then "weigh[ed] the gravity of Ewing's offense," explaining that "we must place on the scales not only his current felony, but also his long history of felony recidivism." In Andrade, the Court looked beyond Andrade's most recent convictions to detail his extensive criminal history, and held that in light of that criminal history his sentence was not outside the "contours" of the proportionality principle and thus not an extraordinary case resulting in a sentence that violated the Eighth Amendment. 538 U.S. at 66-67, 76-77.[6] Looking to the nature and circumstance of a defendant's offenses is exactly what a reviewing habeas court must do. How else is the court to determine whether it is the exceedingly rare case where the sentence imposed was grossly disproportionate and whether any state court decision to the contrary was an unreasonable application of that clearly established principle?

The state complains that such an approach is improper, yet the state declined to seek review of the Ninth Circuit's decision which established that review process for Eighth

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[6]This Court has looked beyond the mere fact of conviction in other contexts as well. For example, in determining whether a prior conviction meets the requirements for a sentencing enhancement, this Court has recognized that some statutes may cover conduct which would not be subject to a sentence enhancement. Where it is unclear from the statute itself whether an enhancement was proper, this Court has permitted a modified approach where a court may look beyond the statute of conviction itself to other evidence which indicates the nature of the offense. See Taylor v. United States, 495 U.S. 575, 602 (1990).

Amendment claims post-Andrade. See Ramirez v. Castro, 365 F.3d 755 (9th Cir. 2004). But regardless of the process utilized, the state now seeks to have this Court declare in this case that no California prisoner serving a three strikes sentence can ever qualify for habeas relief of an Eighth Amendment claim – regardless of the facts and circumstances in the case. The state's argument is premised on the erroneous belief that *all* three strikes sentences in California are necessarily constitutional in light of Andrade. But such a holding would negate the entire line of cases starting with Weems v. United States, 217 U.S. 349, 371 (1910), which was applied to the states in Robinson v. California, 370 U.S. 660, 667 (1962) (applying Eighth Amendment to states via the Fourteenth Amendment), and which was *reaffirmed* in Andrade, which hold that any sentence which is grossly disproportionate *does* violate the Eighth Amendment's proscription on cruel and unusual punishment. The mere fact that California says a sentence satisfies the Eighth Amendment does not necessarily make it so. Prisoners have the right to challenge that *ipse dixit* in the federal courts, and in the exceedingly rare case, may have that sentence declared grossly disproportionate in violation of the Eighth Amendment.

To the extent the state seeks to have this Court overrule the "clearly established" gross disproportionality principle from Weems and Solem and Harmelin and Ewing and Andrade, this case is not the appropriate vehicle since *no habeas relief has yet been granted* and we won't know if the sentence imposed here was grossly disproportionate until the lower courts can review the facts surrounding Mr. Reyes's prior strikes. Accordingly, the writ should be denied on this issue.

II

There is no need for this Court to review the claim that it violates 28 U.S.C. § 2254(e)(2) to permit a habeas litigant to develop facts underlying his prior convictions as part of an Eighth Amendment claim when he never attempted to develop those facts as part of such a challenge in state court because (1) the claim is premised on an assumption that Mr. Reyes did not attempt to develop facts underlying his prior convictions in state court, but the record supports no such premise, (2) by remanding the case to the district court for additional fact development and to determine whether relief should be granted in the first instance, the Ninth Circuit has done nothing that violates any statute or conflicts with any precedent, and (3) the proper forum for the state to litigate this claim is in the district court, not this Court.

The state argues that the Ninth Circuit failed to adhere to the limits imposed by 28 U.S.C. § 2254(e)(2) when it remanded this case to the district court to develop the factual record as to the circumstances surrounding his prior strikes. (Pet. 11-13). It argues that the record fails to show that Mr. Reyes ever sought to develop these facts in any state court proceeding, and thus by remanding the case and ordering a hearing the Ninth Circuit's decision here conflicts with the express provisions of 28 U.S.C. §§ 2254(d)(2) and (e)(2), as well as this Court's decisions in Holland v. Jackson, 124 S. Ct. 2436, 2737-38 (2004), and Williams v. Taylor, 529 U.S. 420, 430, 432, 435 (2000). (Pet. 12). But the state's argument apparently is premised on a misreading of the record and/or a fundamental misunderstanding of § 2254(e)(2), the cases interpreting the statute, and habeas fact development in general. The Ninth Circuit's decision neither conflicts with this Court's precedents nor the statute itself.

As an initial matter, the state argues that the district court will be required to hold an evidentiary hearing. (Pet. 12). That is false. The Ninth Circuit only remanded "for the district court to develop the record further." (Pet. App. A13). If the court is able to develop the record

further without the need for an evidentiary hearing, it may do so. And that very well may be the case here. Although the state argues that "[t]he record fails to show . . . that Reyes ever sought to develop those facts [regarding the circumstances underlying his prior strikes] in any state court proceeding," (Pet. 12), that may, in fact, not be true, and in any event, would not in itself necessarily violate 28 U.S.C. § 2254(e)(2).

It is certainly true that the nature and circumstances of Mr. Reyes's prior strike convictions is unclear from the record before the Ninth Circuit; that is why the court remanded the case to the district court for further fact development. But the fact that the record before the Ninth Circuit is incomplete does not mean the facts and circumstances of those prior strike were not presented in any state court proceedings. Indeed, Mr. Reyes (through counsel) argued in his opening brief in the Ninth Circuit:

> The record on appeal presented to the California Court of Appeal, Fourth District, Division Two, the California Supreme Court, and the United States District Court relative to the petition for a writ of habeas corpus filed therein did not include Exhibits 5, 6, and 7 which, according to the exhibit description (SCT, P. 148; ER 10, p. 73), were the evidence relative to the priors alleged against appellant.

Reyes Ninth Cir. Opening Br., *available at* 2001 WL 34355185, at *22. Thus, the facts the state claims were not developed in any state court proceeding may in fact have been fully developed, and can found in portions of the record that were never submitted to the district court by the state when it lodged the state court proceedings. Of course, the only way to know for sure if for the district court to figure it out – just as the Ninth Circuit has said it must. The Supreme Court is not the appropriate forum to clear up the record. Accordingly, because the entire premise of the state's claim is an assumption about the record which may not exist, the issue is simply not

properly presented to this Court and review should be denied.

In any event, a habeas litigant's failure to develop the factual basis of a claim in state court does not in itself preclude an evidentiary hearing under 28 U.S.C. § 2254(e)(2). This Court has made clear that "[u]nder the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." Williams, 529 U.S. at 432. It is only prisoners who are at fault for the deficiency in the state court record who would lose the right to an evidentiary hearing under § 2254(e)(2). Id. at 433. Thus,

> The question is not whether the facts could have been discovered but instead whether the prisoner was diligent in his efforts. The purpose of the fault component of "failed" is to ensure the prisoner undertakes his own diligent search for evidence. Diligence for purposes of the opening clause depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court; it does not depend . . . upon whether those efforts could have been successful.

Id. at 435.

At this point, because the issue has not been litigated in any lower court, we do not know whether Mr. Reyes lacked diligence in failing to develop the record – assuming, *arguendo*, that the record wasn't developed – and should now be barred from developing the facts surrounding his prior strikes. That is an issue which also should be for the district court to decide in the first instance, not this Court.

Finally, there is nothing in the Ninth Circuit's decision to remand for further factual development that is barred by any precedent. To the contrary, in Holland v. Jackson, 542 U.S. 649, 653 (2004), this Court criticized the Sixth Circuit for granting habeas relief by relying on

evidence apparently not developed in state court which neither the district court nor the Sixth Circuit had found either met the limitations of § 2254(e)(2) or was not subject to the statute because the petitioner had been diligent in pursuing the evidence. Here, by contrast, the Ninth Circuit has required the district court to look into that question. It has not, as the state appears to suggest, directed the district court to consider facts not previously developed in state court. It has merely required the district court to look into it in the first instance. And it is most appropriately in the district court – not this Court – where the state can argue the applicability of § 2254(e)(2) if it is found that the facts surrounding Mr. Reyes's prior robbery conviction were not developed before the state court.

In short, nothing the Ninth Circuit has done here violates the rules. And this Court is not in the habit of issuing advisory opinions or reviewing a case where the record is unclear. It is simply premature for this Court to weigh in at this time. Accordingly, the writ should be denied.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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DATED: May 15, 2006

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No. 05-755

IN THE SUPREME COURT OF THE UNITED STATES

S.W. ORNOSKI, Acting Warden,
Petitioner,

- v. -

SANTOS L. REYES,
Respondent.

CERTIFICATE OF SERVICE

I, Jonathan D. Libby, a member of the Bar of this Court, hereby certify pursuant to Sup. Ct. R. 29 that on this 15th day of May, 2006, a copy of Motion for Leave to Proceed in Forma Pauperis and Brief for Respondent in Opposition (to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit) were mailed, postage-prepaid, to:

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Respectfully submitted,

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No. 05-755

IN THE SUPREME COURT OF THE UNITED STATES

S.W. ORNOSKI, Acting Warden, *Petitioner,*

v.

SANTOS L. REYES, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

No. 05-755

S.W. ORNOSKI, Acting Warden, *Petitioner,*

v.

SANTOS L. REYES, *Respondent.*

Petitioner S. W. Ornoski, Acting Warden, submits this brief in reply to Respondent's Brief In Opposition to the Petition for Writ of Certiorari

A. Certiorari Should Be Granted Because The Ninth Circuit's Published Opinion, Remanding The Case To The District Court For Further Development Of The Record, Clearly Conflicts With This Court's Relevant Jurisprudence And The Anti-Terrorism And Effective Death Penalty Act (AEDPA)

1. Reyes contends there is no need for this Court to review the first question presented in this case. Opp. at 7. In support of his contention, Reyes argues that Petitioner has read something into this Court's decision in *Lockyer v. Andrade*, 538 U.S. (2003) that is not there, i.e., that *Andrade* implicitly held that a federal habeas court cannot find a state court ruling upholding an Eighth Amendment challenge to a properly imposed Three Strikes sentence contrary to, or an unreasonable application of, this Court's clearly established precedent. Opp. at 7-8. He argues that this is so for two reasons. First, he notes

that in *Andrade*, this Court acknowledged that the gross disproportionality principle remains applicable in the exceedingly rare and extreme case. Therefore, he claims, even a Three Strikes sentence could be grossly disproportionate, and thus a state court's contrary conclusion might be an objectively unreasonable application of this Court's clearly established law. Opp. at 8. Second, he notes that in *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), this Court held that a state court decision is contrary to clearly established precedent if it confronts a set of facts materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from this Court's precedent. Therefore, he claims, if a Three Strikes case involved facts materially indistinguishable from *Solem v. Helm*, 463 U.S. 277 (1983), and a state court decision found the sentence not grossly disproportionate, the state's decision could be set aside under 28 U.S.C. § 2254(d)(1). Opp. at 8-9.

Reyes misses the point with both arguments. First, while he is correct in his assertion that *Andrade* held a gross disproportionality principle applies in an exceedingly rare and extreme case, *Andrade* itself dealt with virtually the most exceedingly rare and extreme case California could present under its Three Strikes law, i.e., two consecutive sentences of twenty-five years to life with relatively minor triggering offenses. Nevertheless, this Court held that the state court's merits decision was neither contrary to, nor did it involve an unreasonable application of, the gross disproportionality principle. *Andrade*, 538 U.S. at 73-74. Accordingly, the implicit holding in *Andrade* was, as Petitioner argued in the petition for writ of certiorari, that no properly imposed Three Strikes sentence could violate the principle, regardless of whether the state chooses to seek further review in a particular case or not. *See* Opp. at 9-10 (citing the California Attorney General's statement as to why the State declined to seek further

review of the Ninth Circuit's decision in *Ramirez v. Castro*, 365 F.3d 755 (9th Cir. 2004) (*Ramirez*-I).[1/]

Second, it would be impossible for a Three Strikes case to be materially indistinguishable from *Solem*. As this Court has explained, the facts in *Andrade* were not materially indistinguishable from the facts in *Solem*, if for no other reason than that *Solem* involved a life sentence with no possibility of parole, whereas Andrade retained the possibility of parole, albeit in practical terms he might never realize that possibility. *Andrade* 538 U.S. at 74. In other words, California's three-strikes law, even in its harshest form, provides for the possibility of parole, and therefore a sentence imposed under the law could never be materially indistinguishable from *Solem*.

2. Reyes argues granting certiorari is not warranted in this case because the Ninth Circuit has not granted habeas relief in this case, and may never do so. Opp. at 9. Noting Petitioner's arguments for why this case warrants review by this Court - that the Ninth Circuit's recent decisions confirm that the court continues to misunderstand the scope of federal habeas review, that the Ninth Circuit has failed to be guided by this Court's recent decisions concerning habeas review of Eighth Amendment challenges, and that the Ninth Circuit's decision in

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1. As to Reyes's reference to the State's decision not to seek further review in *Ramirez*-I, he seems to be implying that because the State did not seek further review it endorsed the legal reasoning in the opinion. Reyes is incorrect. The question of whether to seek further review of a lower court decision necessarily involves a discretionary policy decision. Although that decision may include an assessment of the legal reasoning in an opinion, it also inherently concerns a number of other factors unrelated to whether the opinion was legally sound or not. Stated another way, a decision to not seek further review no more suggests an endorsement of the underlying legal reasoning than this Court' denial of a petition for writ of certiorari suggests an endorsement of an underlying decision. Accordingly, nothing about the State's decision to not seek further review in *Ramirez*-I has anything to do with the question presented to this Court, i.e., whether federal habeas relief can be granted on Eighth Amendment grounds for any properly imposed Three-Strikes sentence.

this case will lead to inconsistent outcomes dependent on how panels choose to parse facts - Reyes argues that the inchoate nature of the remedy underlying the Ninth Circuit's opinion belies Petitioner's rhetoric, reveals Petitioner's argument is misleading, and fails to give the entire picture. Opp. at 9.

Reyes fails to comprehend the critical feature of the opinion, however. Although the ultimate disposition of this case has not yet been determined, the Ninth Circuit published its opinion. There can be no reason for publishing a decision remanding this case to develop the specific facts concerning a prior conviction, rather than accepting the State's definition of the crime, other than to establish a vehicle for dismantling *Andrade*. This is evidenced by the fact that, not long after ordering the opinion published the Ninth Circuit cited it as authority for ordering the same sort of record development in another case, i.e., *Ramirez v. Terhune*, 128 Fed. Appx. 663 (2004) (*Ramirez*-II), which is also the subject of a petition for writ of certiorari currently pending in this Court (docket number 05-736). This procedural history cannot be ignored. As the dissent in this case pointed out, some judges on the Ninth Circuit chafe at this Court's decisions in *Ewing v. California*, 538 U.S. 11 (2003), and *Andrade*. *See Reyes v. Brown*, 399 F.3d 964, 971 (9th Cir. 2005) (Tallman, J., dissenting).

Thus, the history in this case strongly suggests that if the Ninth Circuit's opinion is left intact, the fundamental role of a habeas court under the AEDPA, i.e., to determine whether the state court's merits decision was contrary to, or involved an unreasonable application of, this Court's controlling precedent, may be subjugated to a panel's subjective opinion as to what sort of sentence is justified. Such a notion is inconsistent with this Court's recent habeas jurisprudence. *See Harmelin v. Michigan*, 501 U.S. 957 (1991) (proportionality review by federal courts should be informed, to the maximum possible extent, by objective factors) (Kennedy, J., concurring); *Andrade*, 538 U.S. at 76 (the proportionality principle, whose precise

contours are unclear, gives legislatures broad discretion to fashion a sentence).

3. Reyes further argues that certiorari should not be granted because, relying on *Andrade*, the Ninth Circuit has consistently denied habeas relief to Three Strikes prisoners, even where the triggering offense was minor. Opp. at 10. In support of his contention Reyes cites numerous cases where the Ninth Circuit denied habeas relief. Opp. at 10-14. Therefore, he maintains, it cannot be reasonably argued that the Ninth Circuit is a "renegade court gone amok," such that this Court's intervention is required. Opp. at 14.

Preliminarily, Petitioner submits that Reyes's rhetoric is unwarranted and inaccurate. Petitioner has never suggested that the Ninth Circuit is a renegade court gone amok. To the contrary, Petitioner recognizes that the judges of the Ninth Circuit apply the law conscientiously, as they understand it. Nor does Petitioner dispute the notion that in large part the Ninth Circuit has reached the correct result in cases seemingly controlled by *Andrade*. Nevertheless, it is also apparent that some panels of the court appear to misunderstand this Court's recent habeas jurisprudence. And as a result, they appear to want to act in equity rather than as a habeas court.

In any event, Petitioner draws a different conclusion than the one Reyes draws from the Ninth Circuit's denial of habeas relief in numerous Three Strikes cases involving minor triggering offenses. A federal court may grant a certificate of appealability in a habeas case involving a state prisoner upon a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). This standard requires a "showing that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 and n. 4). Thus, the fact that the Ninth Circuit and the district courts within its jurisdiction have granted certificates of appealability in over eighty cases means

that, in a significant number of Three Strikes cases the federal courts have concluded that the question of whether the State correctly applied this Court's Eighth Amendment jurisprudence is debatable among reasonable jurists. Surely, that was not the State's understanding of the implications of this Court's decision in *Andrade*. Stated another way, the sheer volume of grants of certificates of appealability suggests that a significant portion of the Ninth Circuit and the district courts within the circuit still do not understand the limitations this Court placed on federal habeas courts when they review the decisions of California Courts in Three Strikes cases involving Eighth Amendment claims. Accordingly, certiorari is warranted.

4. Citing *Solem's* three-part proportionality test, Reyes argues granting certiorari is not warranted in this case because this Court has endorsed the idea that, in conducting a proportionality analysis under the Eighth Amendment, courts may use other accepted principles in measuring the harm caused or threatened to the victim or society. Citing *Ewing* and *Harmelin*, he argues that looking to the nature and circumstances of a defendant's offenses is exactly what a habeas court must do, because otherwise a habeas court cannot determine whether it is the exceedingly rare case where the sentence was grossly disproportionate and a state court decision to the contrary was an unreasonable application of that principle. Opp. at 15-16.

Once again, Reyes misses the point. *Solem* was a pre-AEDPA case. Thus, it did not limit a federal habeas court to deciding whether a state court's determination of a term-of-years sentence was objectively unreasonable or not. In addition, the continued validity of *Solem* is questionable in that in *Harmelin* five justices disapproved the three-part test. Thus, *Solem* has limited application in addressing the question presented in this case. Besides, neither *Ewing* nor *Harmelin* involved habeas review. Moreover, as argued in the petition for writ of certiorari in this case, this Court's decision in *Ewing* has little, if any, precedential value regarding federal habeas review. It was a plurality decision of three Justices, with two other

Justices joining only the judgment, one on the grounds that the Eighth Amendment contains no proportionality principle, and the other on the grounds that any proportionality principle contained in the Eighth Amendment applies only to modes of punishment. Thus, the only rule of law that can be distilled from *Ewing* is that, in California, a sentence of twenty-five years to life for a Three Strikes recidivist who commits grand theft does not violate the Eighth Amendment. Why it does not violate the Eighth Amendment is still subject to debate.

The point is that, in *Andrade* this Court acknowledged that the Court has not provided any clearly-established precedent - at least none that is particularly useful - regarding how to apply the vague gross disproportionality principle to California's Three Strikes law. That is why the Court limited application of the principle to the exceedingly rare and extreme case. Petitioner construes the Court's holding to mean that the principle applies to a sentence that is so extreme that no one would dispute that it is disproportionate. The principle certainly does not apply to recidivist sentencing schemes such as California's Three Strikes law. Accordingly this Court's intervention in this case is warranted.

5. Reyes argues that this Court should not grant a writ of certiorari in this case because, when a statute is unclear regarding whether an enhancement is proper this Court has permitted a court to look beyond the statute of conviction to other evidence indicating the nature of the offense. Opp. at 16 n. 6. But California's three-strikes law is not an enhancement; it is an alternative sentencing scheme for certain specified recidivists. Thus, Reyes's point is irrelevant. Moreover, California's three-strikes law is absolute. And, in this case, it flatly requires a sentence of twenty-five year to life because Reyes has previously been convicted of two enumerated serious or violent felonies. Thus, there is no ambiguity in the statute in question here.

6. Reyes further claims this Court should deny the petition for writ of certiorari in this case because Petitioner seeks to have

this Court declare that no California prisoner serving a three-strikes sentence can ever qualify for habeas relief on an Eighth Amendment claim, regardless of the facts and circumstances in the case. Opp. at 17. Reyes's contention is a distortion of Petitioner's request. The notion underlying Petitioner's argument is that no properly imposed three-strikes sentence could qualify for habeas relief on Eighth Amendment grounds until such time as this Court provides greater clarity regarding what factors may indicate gross disproportionality. *See Andrade, 538 U.S.* at 72 (our cases exhibit a lack of clarity regarding what factors may indicate gross disproportionality). Until that occurs, federal habeas review should be far more limited than is apparent in this case.

7. Finally, Reyes maintains certiorari should not be granted in this case because the State is seeking to have this Court overrule an entire line of cases, including *Weems v. United States*, 217 U.S. 349 (1910), *Solem v. Helm*, *Harmelin v. Michigan*, *Ewing v. California*, and *Lockyer v. Andrade*. Opp. at 17. Reyes's contention reflects a persistent misunderstanding of the relationship between this Court's Eighth Amendment jurisprudence and its habeas jurisprudence.

Weems, *Solem*, *Harmelin*, and *Ewing* are all cases in which this Court directly addressed the question of whether a term-of-years sentence violated the Eighth Amendment. The instant matter, however, involves a federal court sitting in habeas review of a state court decision. Thus, the analysis shifts from the question of whether the sentence violates the Eighth Amendment to whether there are any clearly established principles concerning the Eight Amendment's application to terms-of-years sentences, and if so, whether the state court's decision was contrary to, or involved an unreasonable application of, those principles. As this Court has implicitly acknowledged, however, the only clearly established principle addressing this question is so vague that it cannot be usefully applied. Thus, if this Court were to hold as Petitioner has requested, it would not negate any of this Court's pure Eighth

Amendment jurisprudence, whatsoever. It would simply make explicit what has previously been implicit, i.e., that given the current state of this Court's Eighth Amendment jurisprudence and the current state of California's Three Strikes law, no sentence properly imposed under the state statute, which had been upheld on state appeal or habeas corpus, could be contrary to, or involve an objectively unreasonable application of, controlling precedent.

B. Certiorari Should Be Granted Because The Ninth Circuit's Published Opinion, Remanding This Case To The District Court For Further Development Of The Record, Fails To Adhere to The Express Limitations Congress Imposed Through The AEDPA And Conflicts With This Court's Relevant Precedent

1. Reyes argues that a writ of certiorari should not be granted as to the second question presented in this case because the Ninth Circuit "only remanded 'for the district court to develop the record further,'" and therefore Petitioner's assertion, that the district court will be required to hold an evidentiary hearing, is incorrect. Opp. at 18-19. In support of his argument, Reyes cites his opening brief in the Ninth Circuit, where his attorney noted that the state appellate record did not include Exhibits 5, 6, and 7, which constituted the evidence relative to Reyes's prior convictions. Reyes then argues that an evidentiary hearing may be unnecessary because the evidence may have already been developed, and that said evidence could be found in portions of the record never submitted to the district court by the state when it lodged records of the state court proceedings. Opp. at 19-20.

Reyes's assertion, that the district court will not necessarily have to hold an evidentiary hearing, is incorrect for two reasons. First, his opening brief also noted that his attorney had contacted the clerk in the Exhibits Section of the San Bernardino County Superior Court, who informed counsel that

all the exhibits in the case were destroyed in December 2000. Reyes's Ninth Cir. Opening Brief, *available at* 2001 WL 34355185, at 22 n. 5. Consequently, the exhibits were not available for the State to lodge with the district court, nor are they available now. Second, the Exhibits List from the state court proceedings reveals the referenced exhibits were certified copies of Reyes's prior convictions.[2/] Certified copies of prior convictions do not contain any facts concerning the circumstances of the offenses; they merely reflect the conviction, the statute violated, and the dates the defendant served in prison.

Thus, there is simply no way that the district court will be able to develop the record regarding the circumstances underlying Reyes's prior strike without holding an evidentiary hearing. As pertinent here, 28 U.S.C. § 2254(e)(2) precludes a habeas court from holding an evidentiary hearing where the applicant failed to develop the factual basis for his claim in state court, unless the applicant can show that the factual basis could not have been previously discovered by exercising due diligence. Here, the Ninth Circuit has fashioned a remedy that fails to adhere to the limitations imposed by § 2254(e)(2). Accordingly, a writ of certiorari should be granted.

2. Reyes argues the petition for writ of certiorari should be denied as to the second question presented in this case because nothing about the Ninth Circuit's decision to remand the matter for further factual development is barred by precedent. Opp. at 20. In support of his argument, Reyes claims the Ninth Circuit

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2. The exhibits were certified copies of Reyes's prior convictions, which are commonly known in California as Penal Code § 969b packets. California Penal Code § 969b provides, in relevant part, that if certified by the official custodian, copies of records of any state penitentiary, reformatory, county jail city jail, or federal penitentiary in which the defendant has been imprisoned, may be introduced for the purpose of establishing prima facie evidence that the defendant has been convicted of an act punishable by imprisonment and has served a term therefor in a penal institution.

has merely required the district court to look into the questions of: (1) whether the evidence concerning the circumstances of Reyes's prior conviction was developed in state court; and (2) whether Reyes met an exception to 28 U.S.C. § 2254(e)(2)'s limitations on evidentiary hearing in the habeas court.

Reyes is incorrect. There is no precedent for a habeas court to engage in this sort of expedition. No decision of this Court has remotely suggested that federal habeas courts can look beyond the state's definition of a crime, to the circumstances of its commission, to evaluate the seriousness of prior convictions, when the applicant failed to develop the facts in state court. Contrary to the Ninth Circuit's suggestion, nothing in *Solem* so held. More to the point, § 2254(e)(2) expressly forbids it. Thus, the Ninth Circuit's decision in this case conflicts with this Court's precedent, as well as the controlling statute. Accordingly, a writ of certiorari should be granted.

CONCLUSION

The petition for writ of certiorari should be granted.

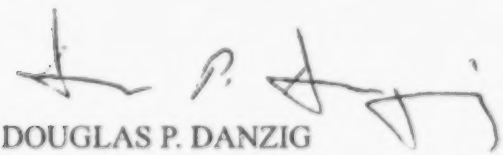
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